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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1983

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Petitioner,*

v.

RICHARD B. OGILVIE, as Trustee of the  
Chicago, Milwaukee, St. Paul & Pacific  
Railroad Company, BURLINGTON NORTHERN,  
INC., and the UNITED STATES OF AMERICA,  
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS  
FOR THE SEVENTH CIRCUIT**

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Date: December 12, 1983

### ISSUES PRESENTED

In the opinion of the petitioner, the following issues are presented by this petition:

1. Did the Court of Appeals err in affirming an order of the Milwaukee Reorganization Court, denying protection to certain employees of the Burlington Northern and Union Pacific Railroads required by Section 5(b)(1) of the Milwaukee Railroad Restructuring Act (45 U.S.C., § 904(b)(1)) upon court approval of the sale of Milwaukee lines to the other carriers based upon an interpretation of a collective bargaining agreement between RLEA and its affiliated unions and the carriers in violation of the provisions of Section 3 of the Railway Labor Act conferring exclusive jurisdiction to interpret such an agreement by an adjustment board provided by that Act for such purpose?

2. Did the Court of Appeals err in affirming an order of the Milwaukee Reorganization court which provided protection to Milwaukee employees who had opted for the statutory protections of Section 5(b)(1) of the Milwaukee Railroad Restructuring Act (45 U.S.C., § 904(b)(1)) as permitted by Section 9 of that statute (45 U.S.C., § 908) but deferred such protections without balancing the equities to determine if such deferral was required to ensure reorganization of the Milwaukee Railroad as required by both the Third Circuit and the Seventh Circuit?"

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**PETITION FOR A WRIT OF CERTIORARI  
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The petitioner, Railway Labor Executives' Association ("RLEA") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on July 15, 1983, affirming a final order and judgment of the United States District Court for the Northern District of Illinois sitting as a Railroad Reorganization Court under Section 77 of the Bankruptcy Act, with respect to the protection of employees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Burlington Northern, Inc., and the Union Pacific Railroad adversely affected by the sale of Milwaukee lines to the Burlington Northern and Union Pacific, as required by Section

5(b)(1) of the Milwaukee Railroad Restructuring Act (45 U.S.C. § 904(b)(1)).

### **OPINIONS BELOW**

The opinion of the Court of Appeals (hereinafter "App. —"), not yet reported, is reproduced herein as Appendix C. The orders of the Reorganization Court, dated March 19, 1982, and June 18, 1982, also not reported, are reproduced in App. B and B-1 hereto.

### **JURISDICTION**

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 15, 1983, (App. C). This petition is governed by the provisions of Title 28, Section 1254(1) and 2101(c) of the United States Code and Rule 20(2) of the Revised Rules of this Court which require the petition to be filed within ninety (90) days after the entry of the judgment of the Court of Appeals for which review is sought.

This Court has extended the time within which to file this petition to and including December 12, 1983 (App. A).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The case primarily involves the interpretation and application of the provisions of Section 5(b)(1) of the Milwaukee Railroad Restructuring Act, which requires the Milwaukee Reorganization Court, in authorizing a sale or transfer of a line of the Milwaukee Railroad to provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of Title 49 of the United States Code. Section 5(b)(1) reads as follows:

(b)(1) Upon the occurrence of an event described in section 22(b) of this Act, on April 1, 1980, whichever

first occurs, the bankruptcy court may authorize the sale or transfer of a line of the Milwaukee Railroad to be used in continued rail operations, subject to the approval of the Commission under paragraph (2) of this subsection. In authorizing any such sale or transfer, the court shall provide a fair arrangement at least as protective of the interest of employees as that required under section 11347 of title 49 of the United States Code.

Section 11347 reads as follows:

"When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title [49 USC §§ 11344, 11345, 11346], the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45 [45 USC § 565]. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

49 U.S.C., § 11347. Other constitutional or statutory provisions referred to are either quoted in context or in the appendix hereto.

#### STATEMENT OF THE CASE

This case involves the interpretation and application of Section 5(b)(1) of the Milwaukee Railroad Restructuring

Act (hereinafter, "MRRA"), 45 U.S.C. Section 904(b)(1), which provides that whenever the court sitting as a Railroad Reorganization Court for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (hereinafter, "MILW") under Section 77 of the Bankruptcy Act (11 U.S.C., Section 205), authorizes any sale or transfer of the MILW lines for use in continued rail operations, "the court shall provide a fair arrangement at least as protective of the interest of employees as that required under" Section 11347 of the Interstate Commerce Act (49 U.S.C., § 11347), and the jurisdiction of the Reorganization Court to interpret a collective bargaining agreement between petitioner and its affiliated unions and the BN and UP known as the Hiring Agreement. The case arose because (1) the Reorganization Court, approved the sale of approximately 500 miles of MILW line to the Burlington Northern, Inc. (hereinafter, "BN") and the Union Pacific Railroad Company (hereinafter, "UP") and, in disregard of the requirements of Section 5(b)(1) of MRRA, failed to provide *any protection at all* for a group of BN and UP employees subject to adverse effects by the sale, and (2) although the Reorganization Court provided some protection for MILW employees, who had opted for statutory protections as against severance pay as authorized by the statute, the court deferred the protective benefits without determining the need therefore as required by Section 5(b)(1) of the MRRA.

Originally incorporated as the Milwaukee & Waukesha Railroad Company in 1847, the MILW grew over the years by expansions and by acquisitions so that by 1977 it was the seventh largest railroad in this country, operating over 9,800 miles of rail lines in sixteen (16) states. *Chicago, M.St.P.&P.R.—Reorganization*, 363 I.C.C. 17, 24 (1980). By 1979, the MILW employed over 10,000 employees to operate its system, most of whom were

represented by member organizations of RLEA. However, competition and a deteriorating financial conditions caused the MILW on December 19, 1977, to seek relief under Section 77 of the Bankruptcy Act (11 U.S.C., Section 205). In April, 1979, it sought permission to "embargo" approximately two-thirds of its system. On September 27, 1979, the Reorganization Court authorized that embargo, effective November 1, 1979. Several days thereafter, the Court of Appeals upheld the authority of a Section 77 Reorganization Court to authorize the suspension of operations over a portion of a debtor's system. *In re Chicago, M.St.P.&P.R.*, 611 F.2d 662 (7th Cir. 1979).

Faced with such a massive cessation of essential rail transportation, Congress passed the MRRRA on November 2, 1979,<sup>1</sup> and in that Act provided for

emergency measures . . . [that] must be taken to restructure the Milwaukee Railroad and to avoid the potential unemployment and damage to the economy of the region and of the Nation which a cessation of essential services by the Milwaukee Railroad would otherwise cause.

45 U.S.C., Section 901(b).

Section 5(b) of the MRRRA gave the Reorganization Court authority to control the time in which the ICC could consider applications to sell or to transfer MILW property for continued rail usage. That subsection also made the Reorganization Court the forum in which to review the ICC's actions on a sale or transfer application; limited the scope of that review; gave the court the authority to authorize interim operations; and gave the court the authority to authorize any such sale or transfer approved by the ICC.

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<sup>1</sup> The MRRRA was signed into law on November 4, 1979, as Pub.L. No. 96-101.

At the same time Congress in Section 5(b)(1) conditioned the authority granted to the MILW Reorganization Court with a requirement that the court protect the interests of employees. Section 5(b)(1) provides:

"In authorizing any such sale or transfer, the court shall provide a fair arrangement at least a protective of the interests of employees as that required under section 11347 of title 49 of the United States Code,"

In March 1980, the MILW Trustee agreed to sell to the BN for \$21 million about thirty (30) parcels of track and yards located in seven (7) states. Shortly after that agreement was reached, the Trustee reached an agreement with the UP to sell eight yard and track segments to that carrier for \$19 million. Approximately 400 miles of track were sold to the BN, while 100 miles went to the UP. The Trustee separately sought preliminary approval of each sale from the MILW Reorganization Court under Section 5(b)(3) of the MRRA (45 U.S.C. § 904(b)(3)). The court gave its preliminary approval to each sale, and also authorized the carriers, pursuant to Section 5(b)(3) of the MRRA, to operate the properties to be acquired pending consideration by the Interstate Commerce Commission (hereinafter, "ICC" or "Commission") of their purchase applications. On October 24, 1980, the Reorganization Court gave its final approval to the sale proposals.

Petitioner RLEA contended before the Reorganization Court, that, if it were to approve the sales, the Court must comply with Section 5(b)(1) of the MRRA by imposing "a fair arrangement at least as protective of the interests of employees as that required under [49 U.S.C. § 11347]. . . ." 45 U.S.C. § 904(b)(1). The court rejected RLEA's arguments by stating that its prior abandonment orders provided the necessary protection for terminated MILW employees, and that if some of those

employees were subsequently "hired for operating the acquisitions, they of course need no further labor protection." RLEA also argued that the employee protections mandated by Section 5(b)(1) of the MRRRA must cover BN and UP employees. The Reorganization Court also rejected that argument on the grounds that "the BN and UP employees are not subject to the Milwaukee Railroad Restructuring Act." Thus, no employee protective provisions were included in the court's final approval order. RLEA, therefore, appealed that order to the Seventh Circuit in Case No. 80-2735.

After RLEA filed its brief in such appeal, the Trustee, the BN, and RLEA<sup>2</sup> agreed that the appeal should be remanded to the Reorganization Court "for the limited purpose of reconsidering [Order No. 409] . . . as it deals with employee protection." 7th Cir. No. 80-2735, Order dated May 26, 1981. On May 26, 1981, the Court of Appeals remanded the case to the Reorganization Court.

Upon remand, the Reorganization Court permitted RLEA to serve interrogatories upon the Trustee, the BN, and the UP in order to enable RLEA to develop the actual impact of the transaction upon their employees. The interrogatory answers of both the BN and the UP showed that the sales of MILW lines involved could adversely affect BN and UP employees outside of the zone or working district of the acquired lines, because employees working in zones or districts immediately impacted by the sales had seniority rights in other zones or districts which could be exercised to jobs in those districts.

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<sup>2</sup> The UP did not enter an appearance in No. 80-2735, and did not participate in the Rule 33 conference which led to the remand order.

Petitioner RLEA argued to the Reorganization Court that Section 5(b)(1) of MRRRA required the imposition of at least the *New York Dock* conditions previously determined by the Interstate Commerce Commission as required by the Interstate Commerce Act (49 U.S.C., § 11347) for the protection of all MILW, BN, and UP employees affected by the sales, except for those employees who were covered by the terms of a March 4, 1980 Hiring Agreement. *New York Dock Ry.—Control—Brooklyn E.D.T.*, 360 I.C.C. 60 (1979), *aff'd*, *New York Dock Ry. v. United States*, 609 F.2d 83 (1979).

This agreement, between purchasing carriers and RLEA's affiliated unions, reproduced in Exhibit E hereto, dated March 4, 1980, provided a limited monetary protection. *See*, H.Rpt. No. 96-838, 96th Congress, 2d Sess. at 53-62 (1980). Those monetary protections were "substantially less protective than the protective conditions under the *New York Dock Railway* case" (H.Rpt. No. 96-839, *supra*, at 22). The agreement provided that it should be the complete protection for bankrupt carrier employees and a purchasing carrier would have no other obligation to other bankrupt carrier employees. As Congress indicated, labor had made those concessions in order to maximize the number of MILW and Rock Island employees hired by other carriers who took over MILW or Rock Island operations. *Id.* Both the BN and UP were parties to that Hiring Agreement.

The agreement also covered employees of the purchasing carriers who were "(1) working in the same seniority district in the zone or working district of the acquired property and (2) are in active service on the date that interim operation is begun or purchase completed, whichever first occurs (*Id.* at Article III, § 1, reproduced at H.Rpt. No. 96-839, *supra*, at 57). All other purchasing

carrier employees, however, were not covered. Thus, BN and UP employees working in a seniority district outside of a zone or working district of the purchased property were not included.

On March 19, 1982, the Reorganization Court rejected the RLEA's position and imposed employee protective conditions suggested by the Trustee for MILW employees who had opted for statutory benefits which accorded less protection than that determined by the ICC as required by the Interstate Commerce Act. 49 U.S.C. § 11347. Moreover, payment of those benefits were ordered to be deferred until some later date. Finally, the protections of BN and UP employees were limited to the March 4, 1980 Hiring Agreement which did not include BN and UP employees who were employed outside the immediately impacted work zones or districts of the two carriers (App. E, Art. III, Section 1).<sup>3</sup>

Petitioner RLEA immediately sought reconsideration or clarification of that portion of the order dealing with the protection to be afforded BN and UP employees. While its motion was pending, RLEA, on April 14, 1982, filed a timely appeal from the order of the Reorganization Court and RLEA's appeal in Docket No. 82-1637 followed.

On June 18, 1982, the Reorganization Court issued a minute order denying RLEA's request stating:

The Motion of RLEA for Reconsideration of Order No. 409-A is hereby denied on the grounds that said motion presents no new issues of law or fact for consideration by this court. The Court further finds that said order is not ambiguous; *it clearly excludes*

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<sup>3</sup> App. B and B-1.

*from protection all BN and UP employees who are not working in seniority districts or zones where purchases are made from the Trustee (Emphasis supplied).*

(App. B-1).

The decision and judgment of the Court of Appeals affirmed the judgment of the Reorganization Court. App. C.

### REASONS FOR GRANTING THE WRIT

- I. The Court Of Appeals Erred In Affirming The Order Of The Reorganization Court Denying Statutory Protections To Employees Of The BN And UP Working In Seniority Zones Or Districts Other Than The Purchased Properties Based On An Interpretation Of The Hiring Agreement. Because Neither The Lower Court Nor The Court Of Appeals Had Jurisdiction To Interpret A Railroad Agreement Upon Which The Decision Was Based

Section 5(b)(1) of the MRRA<sup>4</sup> clearly requires in plain and unambiguous language that the Reorganization Court in authorizing a sale or transfer of MILW lines must "provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of Title 49 of the United States Code, *i.e.*, the Interstate Commerce Act. (App. D hereto). Section 11347, in turn (App. D hereto) provides for a "fair arrangement" for the protection of the "interest of employees who are affected" by a transaction when a railroad is involved in the transaction for which approval of the Interstate Commerce Commission is sought. It is beyond question that Section 11347 requires that both the selling and purchasing carrier employees be protected. Not only does the language require protection for "em-

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<sup>4</sup> Quoted in full in Appendix D hereto.

ployees affected by the transaction" without any limitation as to seller or buyer, it also speaks of transactions in which "a railroad is involved" thus reaching both the seller MILW and buyer BN and UP. Moreover, the Interstate Commerce Commission has so interpreted the statute. *E.g.*, *Burlington Northern, Inc. - Control - St. Louis San Francisco Ry.*, 360 I.C.C. 783, 948 (1980), *aff'd.*, *Missouri K.T.R. v. United States*, 632 F.2d 392 (5th Cir. 1980); *cert. den.*, 451 U.S. 1017. However, the Reorganization Court in its original decision of March 24, 1980, on employee protection for BN and UP employees (App. B-2) rejected such protection on the ground that "Obviously the BN and UP are not subject to the Milwaukee Railroad Restructuring Act." The error in the court's conclusion was itself so obvious that when RLEA appealed the decision, both BN and the Trustee for the MILW agreed to a remand to reconsider the issue of employee protection. On remand, the court shifted grounds and granted protection to BN and UP employees in working zones or districts of purchased lines. However, the Reorganization Court order, as stated in a clarification minute order (App. B-1), "clearly excludes from protection all BN and UP employees who are not working in seniority districts or zones where purchases are made from the Trustee." Such exclusion was based on an erroneous interpretation of a "Hiring Agreement" between RLEA and carriers purchasing MILW lines to which BN and UP were parties as providing the only protection to be accorded BN and UP employees. Such an interpretation was made in violation of the requirements of Section 3 of the Railway Labor Act (45 U.S.C., § 153) which confers exclusive jurisdiction to interpret collective bargaining agreements.

BN stated that the Hiring Agreement was intended by the parties to it to constitute "a complete and binding

statement of the employee protection obligations of purchasing carriers to their own employees and for the Milwaukee employees they hired." (BN Reply Memorandum, dated January 18, 1982, at 11-12). Petitioner RLEA disputed that construction of the language and intent of the Hiring Agreement and directed the Reorganization Court's attention to those portions of the agreement which RLEA asserted supported its contention that the Hiring Agreement was intended to be a complete resolution of the purchasing carrier's labor protection obligations to bankrupt carrier employees (*e.g.*, Appendix D at Article 1, § 2(a)), but was not intended to be a final resolution of *all* labor protective concerns of purchasing carriers. Reply Mem. of RLEA, dated January 28, 1982. The Reorganization Court examined the provisions of the agreement and construed it as constituting a complete statement of the BN's and UP's obligations to protect employees affected by the sales. (App. B). Petitioner RLEA respectfully submits that besides improperly depriving employees of protections mandated by Sections 5(b)(1) of the MRRA, the Reorganization Court's foray into the area of interpreting Railway Labor Act agreements improperly usurped the exclusive jurisdiction of adjustment boards under the Railway Labor Act (45 U.S.C. § 151, *et seq.*), to interpret the terms of a collective bargaining agreement.

Disputes over the interpretation or application of existing agreements under the Railway Labor Act are "minor disputes" (*e.g.*, *Elgin, J.&E. Ry. v. Burley*, 325 U.S. 711, 722-28 (1945)), and if such a dispute cannot be resolved by agreement, it must be submitted to an adjustment board under the Act if either party so requests. *Brotherhood of Railroad Trainmen v. Chicago R.&I.R.*, 353 U.S. 30 (1957). An adjustment board's jurisdiction to resolve minor disputes under the Railway Labor Act is

exclusive; federal courts do not have the subject matter jurisdiction to examine the merits of a dispute over construction of a Railway Labor Act agreement. *Andrews v. Louisville & Nashville R.*, 406 U.S. 320, 322-24 (1972).

The March 4, 1980 Hiring Agreement is an agreement entered into under the Railway Labor Act. That conclusion is indisputable since the source of rail labor's authority to bargain for that agreement is their exclusive representation status under the Railway Labor Act (45 U.S.C. § 152, Fourth), and the agreement itself is one concerning rates of pay, rules and working conditions of employees. *E.g.*, *Order of Railroad Telegraphers v. Chicago & N.W.R.*, 362 U.S. 330 (1960). Also, the dispute over the scope of the Hiring Agreement is obviously a "minor" dispute because it concerns the interpretation of the terms and intent of a Railway Labor Act agreement. *Brotherhood of Railroad Trainmen v. Chicago R.&I.R.*, *supra*. Consequently, the Reorganization Court, appellant RLEA submits, did not have the subject matter jurisdiction to resolve that dispute over the intended scope of the Hiring Agreement.

This does not mean, however, that the Reorganization Court could not examine the impact of that dispute on its obligations under Section 5(b)(1) of the MRRA to provide a fair arrangement to protect all MILW, BN, and UP employees affected by the transactions. RLEA respectfully submits that the court was required by the applicable case law to assume for purposes of its application of Section 5(b)(1) that both interpretations could be correct and refer the dispute for settlement by an adjustment board.

The Court of Appeals found that the petitioner did not make a timely request for reference of the dispute over the interpretation of the Hiring Agreement and thus

waived the issue. The Court of Appeals founded its conclusion on the alleged fact that RLEA twice requested the Reorganization Court to interpret the contract. The Court is now in error in so stating. The record shows that it was the BN who made the request. *See, supra*, page 7. Moreover, the law is clear that jurisdictional issues cannot be waived and that the parties could not confer subject matter jurisdiction on the Reorganization Court to interpret the agreement even if they had all joined in a request. *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites*, 456 U.S. 694 (1982). In that case, this Court stated:

Federal courts are courts of limited jurisdiction. The character of the controversies over which federal judicial authority may extend are delineated in Art III, § 2, cl. 1. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. Again, this reflects the constitutional source of federal judicial power: Apart from this Court, that power only exists "in such inferior Courts as the Congress may from time to time ordain and establish." Art III, § 1. Subject-matter jurisdiction, then, is an Art III as well as a statutory requirement; it functions as a restriction on a federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. "[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, deny its jurisdiction, and, in the

*exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record."* (Emphasis supplied.) (Citations omitted.)

Id. at 701.

The Court of Appeals decision (App. C) also seeks to justify the action of the Reorganization Court on the basis that the Hiring Agreement is a mixture of both a Railway Labor Act and a MRRA, Section 9, agreement. From this springboard, the Court of Appeals decision concludes that it "seems unlikely" that Congress wanted a dispute over a Section 9 agreement to be decided by arbitration subject to the extremely narrow judicial review provided for Railway Labor Act arbitration awards by 45 U.S.C., Section 153. It bases its conclusion on (a) a claim that referral to a Railway Labor Act board would string out the process, (b) that the main reason for arbitration of agreements under the Railway Labor Act is that arbitrators "are better at the task than courts" and that such reason is not applicable to a Reorganization Court which acquires an expertise as to the labor relations of the railroad in reorganization, and (c) RLEA is not asserting an exclusive jurisdiction arising out of the line of cases represented by *Andrews*, but only a primary jurisdiction claim under which a court can at its discretion refer an issue to another forum. None of these grounds for affirming the Reorganization Court are valid.

First: there is a long history of compulsory arbitration of agreements between railroads and its employees based on the 1933 amendments to the Railway Labor Act in Section 3 (45 U.S.C. § 153) and set forth by this Court in *Brotherhood of Railroad Trainmen v. Chicago R. & I.R.*, 353 U.S. 30 (1957). The Interstate Commerce Commission has followed this established principle for the resolu-

tion of disputes over the interpretation of employee protections. *New Orleans & Northeastern R. Co. v. Bozeman*, 312 F.2d 264 (5th Cir. 1963). It would require some definitive statement of Congressional intent in the adoption of MRRA, which provided for the same protections, to change the long established forum for resolution of railroad agreement disputes from arbitration boards to a court. There is no such statement.

Second: the argument as to the need for speed made to support the Court of Appeals conclusion is wholly without merit since Congress in 1966 created Public Law Boards specially appointed by the National Mediation Board to supplement the National Board and apply speed where needed. (45 U.S.C. § 153, Second).

Third: the argument of the Court of Appeals decision that the main reasons for Railway Labor Act arbitration of agreements is the greater expertise of arbitration of the subject matter, which is not true in the case of Reorganization Courts, lacks merit because regardless of the capabilities of a particular court, it is not possible for such a court with its varied subject matter calendar to acquire the expertise of a specialist in the field of arbitrating labor agreements. Moreover, judicial economy is also an important consideration. If the National Railroad Adjustment Board was so overwhelmed with cases as to require the creation of individual boards by Congress in 1966, the burden on federal courts would have been even greater.

Fourth: The efforts of the Court of Appeals decision to avoid the problem by designating it an issue of "primary jurisdiction" in which the discretion of the lower court seeks to be invoked are also without merit. The issue is one of the *exclusive jurisdiction* of adjustment boards to interpret agreements subject to the review process of the statute.

**II. The Reorganization Court Erred In Deferring Protective Benefits For Milwaukee Employees Who Opted For Statutory Protection Rather Than Severance Pay Because The Decision Is In Violation Of The Duties Of A Reorganization Court As Established In Other Circuits**

The Reorganization Court provided protective benefits for those MILW employees who had opted for statutory protection pursuant to Section 9 of MRRA, but deferred such benefits indefinitely. This action was based on a decision of the Seventh Circuit in *In re Chicago, Milwaukee, St. Paul & Pac. R.*, 658 F.2d 1149 (1981), *cert. den.*, 455 U.S. 1000 (1982), hereinafter referred to as the *Milwaukee Appeals* case interpreting the MRRA as requiring such deferrals. RLEA here contended to the Court of Appeals that its decision in the *Milwaukee Appeals* case was no longer viable because of this Court's decision in *RLEA v. Gibbons*, 455 U.S. 457 (1982) which held provisions of the *Rock Island Transition and Employee Assistance Act* (45 U.S.C., Sections 1005 and 1008) unconstitutional under Article 1, Section 8, Clause 4 of the United States Constitution because such provisions were bankruptcy laws applicable only to one debtor. The Court of Appeals decision marches up and down several hills with respect to this issue and alights permanently on none. Finally, the decision concludes that if the Court were certain of a lack of standing in the MILW employees involved, it would rest its decision with respect to the issue on that ground but declines to do so because the decision states "We are not so certain as to be able to place our decision on that ground." It, therefore, alights at long last on an alternative interpretation of the MRRA "that eliminates any problem created by *Gibbons*. That alternative is that the MRRA did not require deferrals of employee benefits after all because Congress assumed the power to defer as an equitable power of the Reorganiza-

tion Court so that MILW employees electing statutory benefits could be confident that the court would exercise such equitable power to defer payment thereof which would in turn discourage employees from opting for such benefits. Therefore, the Court of Appeals concludes that the MRRA can be read as not providing for deferral, thus giving rise to no lack of uniformity under the bankruptcy laws.

This labored exercise comes to naught because it fails to answer the basic problem raised by RLEA that the equitable powers upon which the Court of Appeals finally rests the authority of the Reorganization Court to defer, require that court to reexamine whether the deferral of any employee benefits at this stage is required to assure that the Section 77 railroad reorganization is completed. *In re Penn Central*, 452 F.2d 1107 (3rd Cir. 1971), *cert. den.*, 406 U.S. 944 (1972). RLEA sought such a reexamination by the Reorganization Court. That Court declined to do so in spite of the clear need therefore.

When the MILW was in its most desperate hour, it projected that to survive it would have to reduce its rail system by two-thirds and that it would have to cut its labor force from over 11,000 employees to between 5,800 and 6,000 people. Plan of Reorganization, dated August 10, 1979, at 5, 10, 27 and 28. If traditional employee protective benefits were required to be paid to effectuate such a reduction, the Trustee estimated, the estate would be required to spend approximately \$325 million over the six-year protective period of those traditional protections. *Id.* at 50-51. Such a massive cost, the Trustee concluded, would prevent a reorganization of the estate. *Id.* at 51. Based on similar assertions, the *Milwaukee Appeals* panel upheld the deferral of traditional employee protection claims.

As the Trustee reported in his Revised Plan of Reorganization, dated September 15, 1981, the transition to the new MILW was almost complete by late 1981. By September 1981, the work force had been reduced to 7,400; also, 2,219 claims had been filed against the estate for employee protection benefits due to those reductions. *Id.* at 17. 1,852 of those claims were under the alternative employee protection program (*Id.*), but as of September 15, 1982, only 74 employees had, in effect, elected the traditional employee protective benefits "with claims totaling approximately \$4.7 million . . . ." *Id.* Eleven of those MILW employees are, RLEA assumes, the eleven who were affected by the sales at bar and who are still eligible for traditional benefits. And assuming that all things remain constant and are proportional, if the total employee protection cost for those eleven employees under MRRA Section 5(b)(1) is \$1.4 million, the total of all MRRA Section 5 employee protection claims would be approximately \$10 million over a six year period, excluding medical expenses. Surely, the payment of such an amount over a period of several years will not destroy the MILW's chances to reorganize successfully, especially when it is remembered that the interest earned by the property sales escrow accounts in 1981 alone would cover such an expenditure.

In his Revised Plan of Reorganization, the Trustee noted that he forecasted an additional reduction of 1,000 people in this work force, and that if traditional protection benefits were elected, the estate "could face an obligation of up to \$100 million." Revised Plan at 17. However, since that Revised Plan was filed, and prior to the Reorganization Court's issuance of Order No. 409-A, the Trustee was authorized to further restructure the MILW and to reduce his employment level so that the additional reductions in force contemplated by the Revised Plan, RLEA

submits, have now occurred. By Order No. 560, dated March 15, 1982, the Trustee was authorized to abandon his trackage west of Ortonville, Minnesota. And by Order No. 552, dated February 4, 1982, the Trustee was authorized to enter into a crew reduction agreement with the United Transportation Union. *See*, Revised Plan, § 3.7, at 26. Both of those orders have, in effect, authorized sizable reductions in forces which the record before the Reorganization Court showed were to be accomplished under the alternative employee protection program.

In short, the record before the Reorganization Court, when it was considering the remand of Order No. 409, established beyond question that the immediate termination of the deferral of traditional employee protective benefits would not harm the MILW's chances to reorganize successfully. Moreover, as shown by the stipulated testimony of Mr. Thomas B. Thompson, claimants such as Mr. Thompson are in great need of those benefits, including the medical insurance. However, Order No. 409-A does not show that the reorganization court balanced the equities in this case or gave proper consideration to "its duty to reassess continually the progress of the reorganization in light of the financial circumstances of the various [employees] . . . and to terminate the injunction [*i.e.*, deferral] at the earliest feasible date as required." *In re Penn Central Transp. Co.*, 452 F.2d 1107, 1109 (3rd Cir. 1971), *cert. denied*, 406 U.S. 944 (1972). RLEA respectfully submits that the failure of the court to make findings on this issue clearly warranted a remand of Order No. 409-A's deferral of MRRRA Section 5(b)(1) benefits.

### CONCLUSION

The decision below is in direct conflict with decisions of this Court holding that the exclusive jurisdiction to in-

interpret agreements between railroads and its employees is vested in arbitration boards provided for by Section 3 of the Railway Labor Act (45 U.S.C., § 153). It also conflicts with the decision of the Third Circuit cited as *In re Penn Central Transportation Company*, 452 F.2d 1107 (3rd Cir. 1971), *cert. den.*, 406 U.S. 944 (1972) as well as an earlier decision of the Seventh Circuit Court of Appeals in the *Milwaukee Appeals* cases, *supra*, with respect to the exercise of the equitable jurisdiction by the Reorganization Court to defer payments of expenses. This decision raises important questions of federal law concerning the interpretation and application of the MRRA and its relationship to other federal statutes regulating railroads and rail labor which should be reviewed by this Court. For these reasons, the Writ of Certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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JOHN O'B. CLARKE, JR.

(Counsel of Record)

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*Attorneys for Petitioner*

*Railway Labor Executives'*

*Association*

Date: December 12, 1983

## **APPENDIX**

APPENDIX A

**Supreme Court of the United States**

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No. A-263

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RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Petitioner,*

v.

RICHARD B. OGILVIE, ETC., ET AL.

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FURTHER

**ORDER/EXTENDING TIME TO FILE PETITION FOR  
WRIT OF CERTIORARI**

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UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 12, 1983.

/s/ John Paul Stevens  
JOHN PAUL STEVENS  
Associate Justice of the Supreme  
Court of the United States

Dated this 11th day of November, 1983.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

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IN THE MATTER OF:

CHICAGO, MILWAUKEE, ST. PAUL  
and PACIFIC RAILROAD COMPANY,

*Debtor.*

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In Proceedings for Reorganization of a Railroad

No. 77 B 8999

Thomas R. McMillen, Judge

### ORDER NO. 409-A

1. The conditions contained in Appendix B to the Report of the Special Master dated February 20, 1980 are adopted for the protection of Milwaukee Road employees affected by the sales authorized in Order No. 409; Section 4(e) is included therein as specified in Order No. 276B; Appendix B is also modified as follows: Page 1, line 2 shall read "sales pursuant to Section 5 . . ." and Article I, Section 1(a) shall read "'Transaction' means any action to restructure the Milwaukee Road (Railroad) by sale . . ."

2. The Trustee is directed to establish a procedure for the filing of claims by employees for amounts due under that Appendix B;

3. The Court reserves jurisdiction to determine the priority for paying claims under Appendix B at a future date and to determine the rights of employees covered by Appendix B in the event of changed conditions in the consummation of the reorganization proceedings.

4. The conditions contained in the Labor Protection Agreement between Railroad Parties Hereto Involved in Midwest

Rail Restructuring, etc., dated March 4, 1980, are adopted for the protection of Burlington Northern and Union Pacific employees affected by the sales authorized in Order No. 409.

5. The extensive briefs and arguments submitted by the parties in interest have been considered, as have certain developments occurring in this court since June 11, 1981. Nevertheless, the principal guidance for the foregoing Order is found in *Matter of Chicago, Milwaukee, St. Paul and Pacific R. Co., Consolidated Appeals of Railway Labor Executives' Association et al.*, 658 F.2d 1149, 1166, 1167 (7th Cir. Aug. 17, 1981), *cert. den.* 50 U.S.L.W. 3716 (Mar. 9, 1982), and in the provisions of the above agreement dated March 4, 1980.

ENTER:

/s/ Thomas R. McMillen  
THOMAS R. McMILLEN  
JUDGE, U.S. DISTRICT COURT

March 19, 1982

**APPENDIX B-1**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

Name of Presiding Judge, Honorable THOMAS R. McMILLEN

Cause No. 77 B 8999

Date June 18, 1982

IN THE MATTER OF:

CHICAGO, MILWAUKEE, ST. PAUL  
and PACIFIC RAILROAD COMPANY,

The Motion of RLEA for Reconsideration of Order No. 409-A is hereby denied on the grounds that said motion presents no new issues of law or fact for consideration by this court. The court further finds that said order is not ambiguous; it clearly excludes from protection all BN and UP employees who are not working in seniority districts or zones where purchases are made from the Trustee.

ENTER:

Thomas R. McMillen  
THOMAS R. McMILLEN  
Judge, U.S. District Court

**APPENDIX B-2**

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

Name of Presiding Judge, Honorable THOMAS R. McMILLEN

Cause No. 77 B 8999

Date Oct. 24, 1980

IN THE MATTER OF:

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. Co.,

ORDER NO. 409:

Objections to the Trustee's motion of September 10, 1980 are overruled & the Decision of the I.C.C. approving the sale of certain Milwaukee Railroad properties to the BN & UP is approved. An appropriate order will be entered this date. (Decision attached)

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

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No. 77 B 8999

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IN THE MATTER OF:

CHICAGO, MILWAUKEE, ST. PAUL  
AND PACIFIC RAILROAD COMPANY,

*Debtor.*

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In Proceedings For The Reorganization Of A Railroad

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**DECISION ON SALES TO BURLINGTON NORTHERN  
AND UNION PACIFIC RAILROADS**

On August 21, 1980, the Interstate Commerce Commission entered a detailed Decision approving the sale of certain Milwaukee Railroad properties to the Burlington Northern, Inc. (BN) and the Union Pacific Railroad Company and Oregon-Washington Railroad and Navigation Company (collectively UP). It took no action on the competing applications of the Montana Railway Corporation and Bennett Lumber Products, Inc., although vice-chairman Gresham in his concurring opinion found that the latter two proposals are not in the public interest and should be disapproved. On September 10, 1980 the Trustee filed a motion to obtain final approval of the sales.

Several parties have filed objections to the Trustee's motion, and the BN has filed its response to these objections, supported by an affidavits of its Manager-Managerial Planning, Operations Staff. The Trustee also filed a Reply to the objections on September 26, 1980.

The agreements were negotiated pursuant to § 5(b)(1) of the Milwaukee Railroad Restructuring Act which provides that sales of operating properties to other railroads must be scruti-

nized by the Interstate Commerce Commission before this court gives final approval. The decision of the I.C.C. is subject to review by this court in accordance with the provisions of the Administrative Procedure Act, of which § 10(e) provides as follows:

The reviewing court shall— . . .

- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; [or]
  - (D) without observance of procedure required by law; . . . .

We therefore have evaluated the objections in the light of the foregoing statutory restrictions, and in so doing we find that the objections lack merit.

The Mt. Vernon Terminal Railway, Inc. asserts in its objection that it is willing to bid \$4,250,000 for certain segments of the railroad described in its attorney's letter to the Trustee dated September 5, 1980. The difficulties with this proposal are twofold. First, it is an issue which should have been raised when this sale was being considered by the Interstate Commerce Commission. This agency has primary jurisdiction for evaluating and adjusting questions of rail service and competition, and the Mt. Vernon had notice of the hearings. Secondly, the viability of Mt. Vernon's offer depends upon a connection with certain Canadian railroads at Sumas, Washington which cannot be made without operating rights over the BN. The BN has refused to grant such operating rights, and the I.C.C. has refused to require the BN to assign operating rights over its line. This action is not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

Mt. Vernon also attempts to rely upon certain antitrust positions taken by the Milwaukee Road in the Great Northern-BN "Inclusion Case" on the possibility that the pending BN and UP bids were collusive. The BN's affidavit effectively negates any such collusion. Milwaukee's petition in the Inclusion Case has been disposed of. If the Mt. Vernon Railway believes that there has been any violation of the antitrust laws, it has its remedy for damages.

The withdrawal of the Milwaukee Railroad's participation in the Inclusion Case was approved by our order entered March 19, 1980. The Milwaukee has no further interest in this merger from an operating standpoint, following its abandonment of the lines west of Miles City. The I.C.C. has itself ruled that the dismissal of the Milwaukee's objection in the Inclusion Case would not adversely affect a potential antitrust action. F.D. 21478 et al., decision June 30, 1980, p. 2. We doubt that this dismissal, with prejudice, will foreclose the Trustee's antitrust claim, since he has not released it and the statute of limitations has not run. Even if the Trustee for some reason might be precluded from making a claim for antitrust violations against the BN, neither the indenture trustees nor the other objectors assert that they also would be precluded.

Much the same can be said concerning the claim that the BN-UP negotiations were "collusive." The I.C.C. averted to the problem and referred the matter to the Department of Justice. Neither the Trustee nor any of his creditors are precluded from pursuing this in an antitrust action, although the chronology of the negotiations, as presented by the BN memorandum filed September 26, 1980 in this matter, would afford little grounds for optimism in such an undertaking. In any event, all of the antitrust objections are "intangible assets," to use the terminology of the Debtor, and their value, if any, is independent from the price negotiated for these properties.

Finally, the objections relating to possible antitrust violations do not in our opinion afford a basis for setting aside the

I.C.C. decision on either § (2)(A) or (B) of § 10e of the Administrative Procedure Act.

The State of Minnesota and the First National Bank of Chicago as indenture trustee object to that portion of the proposed sale which will close the Miles City, Montana, gateway to shipments originating or terminating in Minnesota. The Trustee's reply filed September 26, 1980 states that the gateway has been reopened for shipments originating or terminating on the Milwaukee Road in South Dakota, North Dakota and Montana, and in certain other respects, thus supporting traffic on the Milwaukee to this extent. The BN points out that an alternative gateway is available to shipments coming into or out of Minnesota. It also points out that this alternative gateway is more than adequate to handle Minnesota shipments, that it has been used for unit trains coming out of Minnesota, and that both the Chicago and Northwestern and the UP have competitive gateways in the event that the alternative BN gateway becomes too expensive. We do not find that the I.C.C. decision discussing this problem (pp. 12-16) is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

The First National Bank of Chicago as an indenture trustee, the Chicago Milwaukee Corporation and the Debtor have objected to the sales not only on the grounds that they may be arbitrary, etc. but also presumably on their usual ground that the consideration of \$40,000,000 invades their constitutional rights under the Fifth Amendment. These objections therefore raise the question of valuation and whether or not the Trustee has made the best available bargain to protect the railroad's assets. With the exception of the late-blooming offer of the Mt. Vernon Railway, there is no evidence in the record that any sale of these properties could be made except to the BN and UP. There is no evidence that they are not for a fair and reasonable price, equal or in excess of the appraised value. The BN and UP were the only purchasers who were in a position to acquire these properties as a unit, the Trustee was in a weak bargaining position because he had already abandoned the

operation of these lines, and he had to make certain concessions in order to obtain the \$40 million consideration and preserve as much service as possible. These objectors do not claim that the properties in question could be sold for a higher consideration if they were dismantled or sold piecemeal, and logic rejects such a conclusion. We find nothing to be gained in trying to second-guess the Trustee's bargain with these two railroads.

The remaining objections were filed by the Railway Labor Executives Association. It contends that the employees of the BN, UP and Milwaukee who are "affected" by the sale be given protection in accordance with 49 U.S.C. § 11347. Obviously the BN and UP employees are not subject to the Milwaukee Railroad Restructuring Act. If Milwaukee employees are hired for operating the acquisitions, they of course need no further labor protection. If they have been terminated because of our prior orders allowing abandonment of these lines, then the provisions for their protection are already in place. The I.C.C. dealt with this matter at pp. 24-25 of its decision. We do not find that the decision of this agency is deficient within the meaning of any of the subsections of the Administrative Procedure Act.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the objections to the Trustee's motion of September 10, 1980 are overruled and the Decision of the Interstate Commerce Commission dated August 21, 1980 is approved. An appropriate order will be entered this date.

ENTER:

/s/ Thomas R. McMillen  
THOMAS R. McMILLEN  
Judge, U.S. District Court

DATED: Oct. 24, 1980

## APPENDIX C

**In the  
United States Court of Appeals  
For the Seventh Circuit**

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Nos. 80-2735, 82-1637

IN THE MATTER OF:

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC  
RAILROAD COMPANY ("MILWAUKEE RAILROAD"),

*Debtor.*

APPEAL OF:

RAILWAY LABOR EXECUTIVES' ASSOCIATION.

UNITED STATES OF AMERICA,

*Intervenor.*

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Appeals from the United States District Court for the  
Northern District of Illinois, Eastern Division.  
No. 77-B-8999—Thomas R. McMillen, *Judge*.

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ARGUED APRIL 21, 1983—DECIDED JULY 15, 1983

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Before POSNER, NICHOLS,\* and COFFEY, *Circuit Judges*.

POSNER, *Circuit Judge*. These consolidated appeals by the Railway Labor Executives' Association (RLEA) from orders of the district court, sitting as the Milwaukee Railroad Reorganization Court, require us to consider the adequacy of the labor-protection arrangements ordered by the court for two classes of employees. The first consists of 11 employees of the Chicago, Milwaukee, St. Paul, and Pacific Railroad who did not elect to receive optional benefits negotiated between the rail-

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\* Hon. Philip Nichols of the Federal Circuit, sitting by designation.

road and the RLEA and embodied in an agreement signed March 4, 1980, and who are demanding that their statutory benefits be paid immediately rather than deferred till the end of the reorganization proceeding. The second group, also seeking statutory benefits, consists of employees of the Burlington Northern and Union Pacific railroads. These railroads purchased some of the Milwaukee Railroad's lines and claim that their labor-protection obligations to their own employees are limited to the obligations imposed by the March 4 agreement. As the Union Pacific is not a party to these appeals we shall ignore it and call the two groups of employees whose claims are in issue the Milwaukee group and the Burlington group.

Closely related aspects of the Milwaukee Railroad reorganization were before us two years ago in *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 658 F.2d 1149 (7th Cir. 1981), and familiarity with our previous opinion is assumed. Briefly, the Milwaukee, which by 1977 was the seventh largest railroad in the country, went broke that year and, not for the first time, sought shelter under section 77 of the Bankruptcy Act of 1898, 11 U.S.C. § 205 (1952 ed.), which though since repealed remains applicable to cases filed under it. Bankruptcy Reform Act of 1978, Pub. L. 95-598, § 403(a), 92 Stat. 2683. It soon became clear that to avoid complete collapse the railroad would have to get rid of about two-thirds of its lines. There were some potential purchasers but the sticking point was that under the Interstate Commerce Commission's rules any purchaser would have to assume potentially astronomical obligations to the workers made redundant by the purchase. In fact, in the name of "labor protection," each such worker would be entitled to six years of full pay. See 658 F.2d at 1156. With thousands of the Milwaukee's workers likely to be discharged, the total cost of protection would have been hundreds of millions of dollars, see *id.*—far more than the lines were worth to prospective purchasers. It seemed that the only way out was for the reorganization court to "embargo" (authorize cessation of operations on) the lines the Milwaukee wanted to get rid of; the hope was that an embargo would not require the ICC's authorization

and hence no labor-protection conditions would be imposed. When we held that such an embargo would be proper in the circumstances, *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 611 F.2d 662, 668-70 (7th Cir. 1979) (per curiam), not only was a major shutdown of rail transportation imminent but thousands of railroad employees could look forward to being laid off permanently with no severance pay. See H. Rep. No. 225, 96th Cong., 1st Sess. 2-3 (1979).

At this point Congress stepped in and passed the Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 901 *et seq.*, in 1979. Among other things the Act transferred primary authority over sales of the Milwaukee's lines from the ICC to the reorganization court, but provided in section 5(b)(1), 45 U.S.C. § 904(b)(1), that in authorizing any such sale "the court shall provide a fair arrangement at least as protective of the interests of the employees as that required under" 49 U.S.C. § 11347. If Congress had stopped there, however, it would not have achieved its purpose of averting the Milwaukee's collapse, for it is under the aegis of 49 U.S.C. § 11347 and its predecessor provisions that the ICC has devised the incredibly expensive labor-protection arrangements that the Milwaukee Railroad could not afford to pay. See *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). Congress therefore went on to require, in section 9 of the Milwaukee Act, 45 U.S.C. § 908, that the unions and the Milwaukee negotiate a labor-protection arrangement the benefits under which would be treated as administrative expenses of the bankrupt estate (section 9(d)). Under principles of equity receivership, which govern railroad reorganizations, see 11 U.S.C. § 205(b) (1952 ed.); *In re Chicago & N.W. R. Co.*, 110 F.2d 425, 430 (7th Cir. 1940), such benefits would be entitled to highest priority, cf. 3 Collier on Bankruptcy § 507.04[1] (15th ed. 1983), and hence as a practical matter would be payable immediately. Section 13 of the Milwaukee Act, 45 U.S.C. § 912, required each employee to choose between receiving benefits under the section 9 agreement and receiving statutory (that is, section 5(b)(1)) benefits.

A section 9 agreement was negotiated—the agreement of March 4, 1980—and it provided for severance pay equal to 80 percent of a worker's pay for three years. Faced with a choice between this bird in the hand and more than two birds (100 percent for six years) in a very remote bush, almost all of the Milwaukee's employees chose the section 9 benefits, thus waiving, by virtue of section 13, any right to section 5(b)(1) benefits. A handful of employees did not elect to receive such benefits; they are the Milwaukee group, whose claim to immediate payment of section 5(b)(1) benefits we turn to first.

Although the Milwaukee Act nowhere states that statutory benefits shall be deferred, it is not easy to make sense out of the Act without assuming that Congress wanted deferral. Since the statutory benefits are not only more generous than the contractual benefits but impossibly more generous, the only way of persuading the employees to waive them—hence the only way of preventing the shutdown of the railroad that it was the statute's main object to avert—was to give them their substitute contractual benefits immediately. Section 9(d) did this, in effect, by making those benefits administrative expenses of the bankrupt estate. But all this might have been futile if statutory benefits had also been payable immediately; for then each employee would have had an incentive to hold out for the statutory benefits in the hope that enough other employees would choose the contractual substitute to make his statutory benefits affordable, and such attempts to beggar-ty-neighbor could have put the Milwaukee right back where it had been before the statute was passed. Thus the structure of the statute, though no specific language, seems to require the deferral of statutory benefits. Compare *Railway Labor Executives' Ass'n v. Southeastern Pennsylvania Transport. Auth.*, 534 F. Supp. 832, 847-48 (Spec. Ct. R.R.R.A. 1982) (Friendly, J.). We so held the last time this case was here. See 658 F.2d at 1158-60.

But since then, the Supreme Court has decided *Railway Labor Executives' Ass'n v. Gibbons*, 102 S. Ct. 1169 (1982), and we are asked to reexamine our earlier decision in light of it.

*Gibbons* held the labor-protection provisions of another special railroad reorganization statute, the Rock Island Transition and Employee Assistance Act, 45 U.S.C. §§ 1005, 1008, invalid under the bankruptcy clause of Article I, which empowers Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States." The Rock Island Act was passed after the Rock Island reorganization court authorized a total shutdown of the railroad and ruled that no labor-protection benefits had to be paid. The Act provided for such benefits; and the provisions that were invalidated in *Gibbons* required treating the benefits as an administrative expense. Since the provisions "cover[ed] neither a defined class of debtors nor a particular type of problem, but a particular problem of one bankrupt railroad," the Court held "that such bankruptcy law is not within the power of Congress to enact. A law can hardly be said to be uniform throughout the country if it applies only to one debtor and can be enforced only by the one bankruptcy court having jurisdiction over that debtor." 102 S. Ct. at 1177.

Although the invalidated provisions of the Rock Island Act resemble section 9 of the Milwaukee Act, which authorizes one class of the creditors of one bankrupt railroad to have their contractually negotiated severance pay treated as an administrative expense, we need not decide how close the resemblance is. Section 9 is not under attack here. The RLEA is not arguing, and given its representative function hardly could argue, that the thousands of Milwaukee Railroad employees who chose to receive immediate benefits under section 9 obtained an unconstitutional preference. Its quarrel is with section 5(b)(1) of the Act, as interpreted in our previous decision to require the Milwaukee's trustee to defer payment of statutory benefits to the employees who did not choose section 9 benefits.

Perhaps concerned with the potential constitutional problem, Congress in section 17(b)(1) of the Milwaukee Act extended the labor-protection requirements of section 5(b)(1) to all other railroad bankruptcies pending when the Act was

passed. The relevant language of the two sections is identical. If section 5(b)(1) requires deferral of statutory benefits for the Milwaukee's employees because the Act authorizes them to receive immediate benefits under section 9, then section 17(b)(1) presumably requires the same kind of deferral in any railroad bankruptcy where the employees of the bankrupt line have a right to choose immediate receipt of substitute benefits. The rub is that other bankruptcy laws do not have counterparts to section 9. Whether directly challenged in these appeals or not, section 9 is hard to ignore in determining the effect of section 5(b)(1) on the rights of creditors. Applied to a reorganization under another bankruptcy law that had no counterpart to section 9, section 17(b)(1) might not require any postponement of statutory benefits, in which event the Milwaukee Act would seem to have a nonuniform effect after all.

Fortunately, however, we need not decide whether this indirect effect would be enough to invalidate the Act as interpreted in our previous opinion to require postponement of statutory benefits. First, having taken advantage of section 9 of the Milwaukee Act to the extent of obtaining many millions of dollars in labor-protection benefits for the workers that it represents—money it does not propose be repaid if it wins this appeal—the RLEA may not turn around and challenge the constitutionality of the statutory scheme of which section 9 is an integral part. Section 5(b)(1), the nominal target of the challenge, is, in combination with section 17(b)(1), a uniform bankruptcy law. It becomes vulnerable only when read together with section 9. Having exploited section 9 for its own purposes in this reorganization proceeding, the RLEA will not be heard to challenge its constitutionality, whether directly or indirectly, in the same proceeding.

Second, the objection in *Gibbons* was to accelerating payment to a class of creditors; here it is to delaying payment to a similar class of creditors. The difference is important. A reorganization court has unquestioned power to defer the payment even of high-priority claims against the bankrupt estate, as we pointed out the last time this case was here, see 658 F.2d at

1164-66, citing *Continental Illinois Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry.*, 294 U.S. 648 (1935). We may assume without having to decide that the reorganization court could not in the absence of the Milwaukee Act force the Interstate Commerce Commission to authorize, without requiring immediate payment of the customary labor-protection benefits, the purchase of a bankrupt railroad's lines; and we know the Commission has been reluctant to allow postponement of such benefits. See *Central R. Co. of New Jersey—Abandonment*, 342 I.C.C. 227, 300 (1972); *Pen~~n~~ Central Transport Co. Reorganization*, 347 I.C.C. 45, 91-92 (1973). But the Commission has no blanket rule that such benefits may never be postponed and we think it well-nigh inevitable that, irrespective of any compulsion the Milwaukee Act might have laid on it, the reorganization court, with the Commission's consent, would have used its equitable powers to defer the payment of benefits to the Milwaukee group. The equities of prompt payment were weak. The members of the group were no longer employees; and they could not have had an urgent need of immediate payment, or else, like most of their brethren, they would have elected to receive immediately the generous benefits provided by the arrangement that their representative had negotiated with the railroad under section 9.

It is no answer that the railroad could have "afforded" to pay statutory benefits to 11 employees at the same time as, or shortly after, it paid section 9 benefits to thousands of other employees. There would not have been 11—there would have been hundreds or thousands—of hold-outs if statutory benefits had been expected to be paid as soon or nearly as soon as section 9 benefits; and with enough hold-outs, the railroad would have shut down and the reorganization would have failed. Postponing payment of statutory benefits was merely honoring the reorganization court's implicit commitment to create a sequence of payments that would scale down labor-protection benefits to a realistic level. See also 658 F.2d at 1166.

If we were certain that because of these equitable considerations the Milwaukee group would not be paid any earlier even if the Milwaukee Act did not require deferral of statutory benefits, we would conclude that the group lacked standing to question the constitutionality of deferral. We are not so certain as to be able to place decision on that ground, but our analysis suggests an alternative interpretation of the Act that eliminates any problem created by *Gibbons*. Earlier we said the Act had to be read to require deferral, as otherwise its objective of preventing the Milwaukee from being destroyed by labor-protection obligations would have been thwarted. But this assumes that workers electing statutory benefits could be confident of having them paid promptly unless the statute required that payment be deferred, and they could not be confident; in fact, they could only be confident of the opposite—that the reorganization court would exercise its equitable powers to defer payment. Since a statutory provision requiring deferral was thus not necessary to induce most employees to elect section 9 benefits, the absence of such a provision may not, as we suggested earlier, have been a congressional oversight. And if the statute need not be read to require deferral of statutory benefits but can be read merely to have assumed without requiring that the reorganization court would use its preexisting equitable powers to defer such benefits, the statute itself creates no lack of uniformity in the bankruptcy laws.

The district court held that the March 4, 1980, agreement barred the members of the second group of employees in this case, the Burlington group, from receiving any benefits under the Milwaukee Act. The RLEA argues variously that the district judge had no jurisdiction to construe the agreement, that he misconstrued it, and that regardless of what the agreement provides these employees are entitled to statutory benefits.

The jurisdictional argument is as follows: The March 4 agreement was an agreement between management and labor over conditions of employment in the railroad industry and therefore a collective bargaining agreement within the mean-

ing of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*; that Act has been interpreted to give the arbitration tribunals set up under it exclusive jurisdiction to interpret such agreements, see, e.g., *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 322-24 (1972) (with an exception for so-called "major disputes" that is irrelevant to this case); therefore the district court had no power to interpret the agreement and ought to have stayed its proceedings while the parties submitted their dispute to arbitration.

There is authority for classifying a labor-protection arrangement that is incidental to a transaction regulated by the Interstate Commerce Commission as a collective bargaining agreement under the Railway Labor Act. See, e.g., *O'Mara v. Erie Lackawanna R.R.*, 407 F.2d 674, 677-78 (2d Cir. 1969), *aff'd* on other grounds *sub nom. Czosek v. O'Mara*, 397 U.S. 25 (1970). But the March 4 agreement states that it is based on the Milwaukee Act as well as on the Railway Labor Act; the agreement was expressly authorized by section 9 of the Milwaukee Act, even though that section refers only to employees of the Milwaukee; and it is therefore a mixture of a section 9 agreement and a Railway Labor Act agreement. We must decide whether Congress, in enacting section 9 without making any reference to the Railway Labor Act, wanted any dispute over a section 9 (or a mixed section 9-Railway Labor Act) agreement to be decided by arbitration, subject to the extremely narrow judicial review of railroad arbitration awards provided in 45 U.S.C. § 153 First (p). See, e.g., *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 93-94 (1978) (*per curiam*).

That seems unlikely. Cf. *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir. 1963), and cases discussed there. Section 5(b)(1) of the Milwaukee Act required the district court to impose labor-protection conditions before approving the sale of any of the Milwaukee's lines to the Burlington. The Burlington argued to the court that the March 4 agreement barred protective conditions for any of its own employees not taken care of in that agreement. To determine the merit of this argument the dis-

strict court had first to determine whether the parties to the agreement intended it to be exclusive. Although the court may have had the power to refer this preliminary question to one of the arbitration boards set up under the Railway Labor Act (a question we need not decide), to have done so would have delayed the reorganization, thus thwarting a major purpose of the Milwaukee Act—to enable the reorganization court to dispose speedily of the Milwaukee's surplus lines and thereby prevent the complete shutdown of the railroad. The Milwaukee Act does provide for reference to the Interstate Commerce Commission, see section 5(b)(2), but under stringent time limits. Yet the RLEA contends there is a duty that is without limit of time to refer any dispute over the meaning of a section 9 agreement to arbitration, so that even though the RLEA did not request such a reference until after it had asked the district court to interpret the agreement and had been disappointed by the court's interpretation, it had an absolute right, founded on the district court's lack of jurisdiction, to the reference. But it is unlikely that Congress would have wanted to allow these reorganization proceedings to be strung out this way, cf. *International Ass'n of Machinists & Aerospace Workers v. Northeast Airlines, Inc.*, 473 F.2d 549, 559-60 (1st Cir. 1972), or that, having displaced much of the ICC's traditional authority over a bankrupt railroad, Congress was concerned with preserving undiminished the authority of the arbitration tribunals created under the Railway Labor Act.

Moreover, the main reason for giving arbitrators exclusive jurisdiction to interpret rail labor agreements—that they are better at the task than courts—has little realism under a statute that designates a particular district court as the court for the reorganization of a particular railroad. The district judge assigned to sit as that court will learn as much about the labor relations of the railroad as any arbitrator. True, there is some role for arbitration under the Milwaukee Act: employees claiming benefits under section 9 are required by section 9(c)(2) to file their claims with the National Mediation Board, which is one of the arbitral bodies set up by the Railway Labor Act; and

presumably the Board would, as an adjunct to its claim-paying function, resolve any disputes over the coverage of the Act. But the employees in the Burlington group are not claiming under the March 4 agreement or any other section 9 agreement (and could not, because section 9 is limited to employees of the Milwaukee) but under section 5(b)(1) itself.

This is another reason why the Burlington group's jurisdictional argument must fail. By claiming that only an arbitrator can determine whether the agreement is a bar to obtaining statutory benefits, the group is not invoking the exclusive jurisdiction doctrine of the *Andrews* line of cases, which confine to the arbitration panels set up under the Railway Labor Act all claims that are within the scope of a railroad collective bargaining agreement but not claims, like these employees' claims, that are not based on the agreement and that the employees contend are not even affected by it. The Burlington group is invoking the distinct doctrine of primary jurisdiction, which comes into play when in the course of a lawsuit properly brought in court an issue arises that is within the competence of some administrative agency to decide, and the suit is stayed while the parties go ask the agency to resolve the issue. See, e.g., *City of Peoria v. General Elec. Cablevision Corp.*, 690 F.2d 116, 120-21 (7th Cir. 1982).

The doctrine of primary jurisdiction has been used, in fact though not in name, to require a reorganization court to refer a question of interpretation of a collective bargaining contract to an arbitral tribunal set up under the Railway Labor Act. See *Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 566-67 (1946); cf. *Air Line Pilots Ass'n v. Northwest Airlines, Inc.*, 627 F.2d 272 (D.C. Cir. 1980). And Congress' desire that such a tribunal rather than a court decide an issue might be so strong that the court would be required to refer the issue on its own initiative even if neither party had requested a reference in timely fashion. But even if Congress in enacting the Milwaukee Act had wanted the reorganization court to refer any issue involving interpretation of a collective bargaining agreement to the tribunals set up under the Railway Labor Act—a doubt-

ful proposition as we have seen—we are quite sure it would not have wanted to prevent the parties to the reorganization proceeding from waiving reference. Otherwise, since there is no statutory deadline on reference (indeed, no statutory mention of reference), reorganization could be indefinitely delayed by a tardy demand for reference. We conclude that a failure to make a prompt request for reference is a waiver of any claim that an issue is within the arbitration tribunals' primary jurisdiction. That claim was waived here by the RLEA's failure to raise the issue till after it had twice requested the reorganization court to construe the contract. The delay was inexcusable, especially given the importance of expediting the reorganization proceeding.

Having concluded that we have jurisdiction to interpret the March 4 agreement, we must next determine whether the agreement was intended to bar a claim to statutory benefits by any Burlington employee not entitled to benefits under the agreement. The agreement itself is ambiguous. On the one hand it is labeled an agreement "between railroads parties hereto involved in midwest rail restructuring and employees of such railroads," and thus would seem to have an intended scope going beyond the Milwaukee's own employees. And it not only makes provision for other railroads' employees, including employees of the Burlington, which was one of the parties to the agreement, but implies in one passage that that provision is exclusive: "A purchasing carrier [such as Burlington] will provide a monthly compensation guarantee, as hereafter provided, only to bankrupt carrier employees hired by the purchasing carrier pursuant to this agreement and to its own employees who are (1) working in the same seniority district in the zone or working district of the acquired property and (2) are in active service on the date that interim operation is begun or purchase completed, whichever first occurs." On the other hand the preamble of the agreement states that its "scope and purpose . . . are to provide . . . a fair equitable and complete arrangement for protection of Milwaukee . . . workers," and later the agreement states that its provisions "shall constitute

the complete labor protection obligation of a purchasing carrier to the bankrupt carrier employees who are taken into its employ because of a transaction." The employees in the Burlington group are not employees of the Milwaukee, the bankrupt carrier.

In an attempt to disambiguate the agreement, the Burlington begins, unpromisingly, with two arguments that are inconsistent—though of course one could be right. The first is that the RLEA has made no showing that any employee not covered by the agreement has been hurt by the Burlington's purchase of lines from the Milwaukee. The basis of this argument is that the Burlington group consists of employees who do not work in the immediate geographical areas of the acquired lines. The Burlington's second argument is that it would never have signed the agreement had it been exposed to potential crushing liability for statutory benefits to employees not covered by it. But if no one is hurt, why would liability—a purely theoretical liability, having no practical consequences—have deterred the Burlington from signing the agreement? In any event, labor-protection arrangements are supposed to be in place before consummation of the purchase, to take care of workers who may be hurt by it. Because the district court had and exercised authority to allow the Burlington to become an interim operator of the Milwaukee lines that it wanted to purchase, there has been some experience with the actual effects of the transfer on Burlington workers in areas remote from the acquired lines, but not enough to be able to say that no such worker could possibly be hurt by the transfer. The March 4 agreement contemplates a merging of seniority districts of the Burlington and Milwaukee in the areas where the acquired lines are located. As a result of this merger some Burlington workers may become redundant and be laid off, and their collective bargaining agreement with the Burlington may entitle them to relocate elsewhere in the Burlington system, thus bouncing workers there who have less seniority. It is those bounced workers who could be hurt by the transaction yet who would have no protection under the March 4 agreement. It is too soon to tell whether there will be any such workers.

The Burlington's second argument is more persuasive. If the March 4 agreement was not intended to be exclusive, it would not have solved the great obstacle that the Burlington saw to purchasing lines from the Milwaukee; having to assume vast liabilities for severance pay. Since most of the workers made redundant by the purchase would be in areas where the lines to be purchased were located, a failure to provide for all possible labor-protection claims would not expose the railroads to catastrophic liability. But you do not need mass lay-offs to make labor protection expensive for a railroad. With statutory benefits set at 100 percent of a worker's wage for six years, one severance can easily cost the railroad \$100,000 or more. Since hundreds of Burlington workers are potentially affected by the transaction besides those in the immediate neighborhood of the acquired lines, there is potential liability in the tens of millions of dollars if the March 4 agreement is found to have the gap that the RLEA claims it does. It is unlikely that the parties agreed to such a gap. True, in *St. Louis-Southwestern Ry.-Purchase*, 363 I.C.C. 320, 380 (1980), the Commission interpreted the March 4 agreement (which applies to acquisitions of Rock Island as well as Milwaukee lines) as not barring out-of-district workers of the Southern Pacific from getting statutory benefits. But, according to the record of that case, Southern Pacific had agreed to protect these workers before the March 4 agreement was signed; and the agreement expressly entitles workers covered by it to choose between it and any preexisting protective arrangement in their favor.

It is also relevant to note that the benefits agreed upon in the March 4 agreement are less than half as large as the statutory benefits. The only thing that made them attractive to the Milwaukee's employees was that they were to be paid immediately, not deferred till the end of the reorganization proceeding. But the deferral feature would not apply to employees of the Burlington, a solvent carrier that would have to pay any labor-protection benefits as soon as they become due, that is, as soon as a worker entitled to them was laid off. This means, though, that under the RLEA's view of the agreement,

adversely affected Burlington employees in areas remote from the acquired lines are to receive twice as much money at roughly the same time as Burlington employees in the area of the acquired lines, who are covered by the March 4 agreement. No reason for such a perverse disparity in treatment has been suggested and we doubt the parties intended the agreement to create it.

The remaining question is whether, even if the March 4 agreement was intended to extinguish any claims to statutory benefits by these employees, the employees can claim those benefits anyway, since section 5(b)(1) requires the Commission to make a fair arrangement that will give the workers at least the benefits they would have under 45 U.S.C. § 11347. They cannot get to first base with this argument unless they are employees within the meaning of the Milwaukee Act, which defines "employees" to include any employees of the Milwaukee Railroad "who worked on a line of such railroad the sale of which became effective on October 1, 1979," but to exclude certain executive officers. 45 U.S.C. § 902(4). Although this definition may not be comprehensive, every specific reference in the Act to "employee" is to an employee of the Milwaukee or occasionally of some other bankrupt railroad; section 9, for example, is explicitly limited to agreements with employees of the Milwaukee. Still, it has long been the practice in railroad acquisitions to impose protective conditions for the benefit of workers of the purchasing as well as of the purchased line, and given the solicitude for labor that suffuses the Act it is implausible that Congress meant to deny the workers of the acquiring railroads any statutory protection.

So the question is whether the March 4 agreement as interpreted to exclude these Burlington workers from any protection from adverse consequences of the acquisition can still be deemed a "fair arrangement" at least as protective of the interests of the employees as is required by 49 U.S.C. § 11347. That section, after also defining minimum labor-protection conditions in terms of a "fair arrangement," states: "Notwithstanding this subtitle, the arrangement may be made

by the rail carrier and the authorized representative of its employees." This implies at least some deference to voluntarily negotiated labor-management agreements such as the March 4 agreement. And what is "fair" under section 5(b)(1) must have some reference to the background and purposes of the Milwaukee Act. The overriding purpose was to avert a complete shutdown of the railroad by providing affected workers with immediate payments in substitution for the overly generous statutory benefits to which they would otherwise have been entitled but which might actually have been completely worthless to them because, if claimed, they would have plunged the railroad into the abyss. See 658 F.2d at 1156 n.9. Although the main concern was with benefits for the Milwaukee's own employees, it would have been difficult to get the purchasing railroads to agree to purchase the Milwaukee's surplus lines if they could not have bought off all labor-protection claims at once—not only the Milwaukee's workers' claims but their own workers' claims. An arrangement that accomplishes this is "fair" even though some workers, rather remotely connected to the transaction, get no protection.

This conclusion is not inconsistent with *Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37 (1971), where the Supreme Court, interpreting a materially identical predecessor of section 11347, held that a labor-protection agreement incidental to a merger did not override the workers' statutory entitlements. The railroad in that case relied on the sentence in what is now section 11347 that authorizes voluntary agreements. The Commission had read this sentence to allow it to delegate the making of adequate protective arrangements to parties negotiating such an agreement. The Court refused to allow the Commission to do this, no doubt fearing lest the labor representatives might not protect the interest of all the workers though obligated to do so by the Railway Labor Act as interpreted in such cases as *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 199 (1944). But in this case there was no automatic deference to the parties. The March 4 agreement was reviewed and approved by both the ICC and the district

court as a fair arrangement. And the crisis that brought on the agreement in this case had no parallel in *Nemitz* and makes this agreement a reasonable one in the circumstance even though it entailed the potential sacrifice of the interests of a small number of the purchasing railroads' workers to the interests of the thousands of Milwaukee employees whose jobs were in imminent jeopardy of disappearing with no severance pay at all. The fact that the sacrifice was only potential further distinguishes *Nemitz*: it is uncertain that workers so tenuously related to the transaction have to be given *any* protection for the arrangement to be fair under section 11347. See *Clemens v. Central R.R. of New Jersey*, 264 F. Supp. 551, 565-68 (E.D. Pa. 1967), rev'd on other grounds, 399 F.2d 825 (3d Cir. 1968); *Laturner v. Burlington Northern, Inc.*, 501 F.2d 593, 608 n. 37 (9th Cir. 1974) (dictum); cf. *American Train Dispatchers Ass'n v. ICC*, 578 F.2d 412 (D.C. Cir. 1978).

AFFIRMED.

A true Copy:

Teste:

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*Clerk of the United States Court of  
Appeals for the Seventh Circuit*

## APPENDIX D

### STATUTORY PROVISIONS INVOLVED

1. Section 5 of the Milwaukee Railroad Restructuring Act, 45 U.S.C. § 904
  2. Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347
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1. Section 5 of the Milwaukee Railroad Restructuring Act, 45 U.S.C. § 904

#### Court Approved Abandonment And Sales

Sec. 5(a)(1) Upon the occurrence of an event described in section 22(b) of this Act, or on April 1, 1980, whichever first occurs, the bankruptcy court may authorize the abandonment of lines of the Milwaukee Railroad pursuant to section 1170 of title 11 of the United States Code. Pending the expiration of the time for appeal of an abandonment order or the determination of any such appeal, the bankruptcy court may authorize the termination of service on a line to be abandoned, and the order authorizing such termination may not be stayed. In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49 of the United States Code.

(2) Prior to the date specified in paragraph (1) of this subsection, the bankruptcy court may hear and consider any request for the abandonment of lines of the Milwaukee Railroad, and may fix the time for the Commission's report on the request, but it may take final action authorizing such abandonment only in accordance with such paragraph (1).

(b)(1) Upon the occurrence of an event described in section 22(b) of this Act, or on April 1, whichever first occurs, the bankruptcy court may authorize the sale or transfer of a line of the Milwaukee Railroad to be used in continued rail operations,

subject to the approval of the Commission under paragraph (2) of this subsection. In authorizing any such sale or transfer, the court shall provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49 of the United States Code.

(2) The bankruptcy court may not authorize a sale or transfer pursuant to paragraph (1) of this subsection unless an appropriate application with respect to such sale or transfer is initiated with the Commission and, within such time as the court may fix, not exceeding 180 days, the Commission, with or without a hearing, as the Commission may determine, and with or without modification or condition, approves such application, or does not act on such application. Any action or order of the Commission approving, modifying, conditioning, or disapproving such application is subject to review by the court only under sections 706(2)(A), 706(2)(b), 706(2)(C), and 706(2)(d) of title 5 of the United States Code. An application may be initiated with the Commission prior to the date specified in paragraph (1) of this subsection.

(3) Pending review of an application by the Commission pursuant to paragraph (2) of this subsection, the bankruptcy court may, on a preliminary basis, authorize the sale or transfer of lines of the Milwaukee Railroad to another rail carrier. The court may permit the purchasing carrier to operate interim service as a common carrier over the lines to be purchased, without regard to section 10901 of title 49 of the United States Code. In operating such service, the purchasing carrier shall use employees of the Milwaukee Railroad to the extent necessary for the operation of such service. The bankruptcy court may take final action authorizing any such sale or transfer only in accordance with paragraph (1) of this subsection.

(c) Nothing in this section shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this act.

**2. Section 11347 of the Interstate Commerce Act, 49 U.S.C.  
§ 11347**

**Sec. 11347. Employee Protection Arrangements In  
Transactions Involving Rail Carriers**

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

**APPENDIX E**  
**LABOR PROTECTIVE AGREEMENT**  
 between  
**RAILROADS PARTIES HERETO**  
**INVOLVED IN MIDWEST RAIL**  
**RESTRUCTURING**  
 and  
**EMPLOYEES OF SUCH RAILROADS**  
**REPRESENTED BY THE RAIL**  
**LABOR ORGANIZATIONS**  
 operating through the  
**RAILWAY LABOR EXECUTIVES' ASSOCIATION**

The scope and purpose of this agreement are to provide, pursuant to the Milwaukee Railroad Restructuring Act (45 U.S.C. Sec. 901 et seq.) and the Interstate Commerce Act (49 U.S.C. Sec. 10101 et seq.), a fair, equitable and complete arrangement for protection of Milwaukee and Rock Island employees taken into the employ of interim service operators and purchasing carriers signatory hereto and to enable the interim service operator or purchasing carrier to be operated in the most efficient manner, as set forth herein, immediately upon authorization for such operation.

**Article I. General Provisions**

1. *Definitions*—Whenever used in this agreement, unless its context requires otherwise:

(a) "Purchasing carrier" means a signatory party to this agreement who is either the interim service operator (pursuant to Commission or Court Order) or the eventual purchaser of a line of railroad of the Rock Island or the Milwaukee, or who is a remaining operating carrier under an existing joint trackage agreement with the Rock Island or Milwaukee.

(b) "Rock Island" means the Chicago, Rock Island and Pacific Railroad Company.

(c) "Milwaukee" means the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

(d) "Bankrupt carrier employee" means any person with an employment relationship (i.e., in active service or on furlough) with the Rock Island, or with the Milwaukee as of the date of this agreement.

(e) "Transaction" means restructuring of the Rock Island and/or the Milwaukee by sales or transfers of railroad lines to a purchasing carrier, or interim operator.

## 2. *Labor Protection Obligations—*

(a) The provisions of this agreement shall constitute the complete labor protection obligation of a purchasing carrier to the bankrupt carrier employees who are taken into its employ because of a transaction. A purchasing carrier will have no labor protection obligation to any other bankrupt carrier employees.

(b) The labor protection obligation, if any, for employees of the Rock Island who are not taken into the employ of a purchasing carrier because of a transaction, and for moving expenses of those employees of the Rock Island who are taken into the employ of a purchasing carrier because of a transaction, will not be the responsibility of the purchasing carrier.

3. *Notice and Negotiation—*A purchasing carrier will notify interested employee representatives, including those on the Rock Island or Milwaukee, of each transaction as soon as it has been authorized to become an interim service operator or finalizes arrangements to be a purchaser. Thereafter, except as specifically provided in Article II the purchasing carrier shall be relieved of any requirement to notify its employees or to reach implementing agreements concerning that transaction.

## Article II. Hiring and Work Rules

1. *Eligibility for Hiring—*All employees of the Rock Island or Milwaukee who held seniority on the effective date of this agreement in a craft represented by one of the labor organizations signatory hereto shall be eligible for participation in the hiring procedures described in this Article.

2. *Determination of Need for Additional Employees*—A purchasing carrier shall determine its necessary additional manpower requirements by craft due to its taking over those Rock Island and Milwaukee Lines. Each of the determinations shall be discussed with representatives of the crafts on purchasing carrier and on the Rock Island or Milwaukee with detailed explanation to them of the basis for each determination prior to serving notice under paragraph 4 hereof, but there shall be no delay in hiring employees or in commencement of operations. If a purchasing carrier has employees on furlough they will not be subject to recall as a result of the additional manpower requirements resulting from a transaction, until after bankrupt carrier employees on appropriate seniority rosters have exhausted their opportunity to be hired hereunder.

3. *Preferential Hiring*—As a carrier determines its need for additional employees under this Article, it shall allow eligible employees in seniority order on the Rock Island or Milwaukee the first right of hire respectively, dependent on whose trackage is involved, and consistent with the purpose of Section 8 of the Milwaukee Railroad Restructuring Act. Each carrier, whether acquiring lines or operating lines on an interim basis, shall independently make such determination of its needs for additional employees irrespective of any determination of this nature made by other carriers. In carrying out the purposes of this section, the purchasing carriers shall first utilize existing seniority rosters applicable to the appropriate craft and seniority district for the lines and territories involved in fulfilling employment needs in connection therewith.

4. *Notification of Hiring*—When a carrier determines that it needs additional employees under this Article, such carrier shall notify the labor organizations representing employees of the Rock Island or Milwaukee of its specific needs and advise them exactly where and how eligible employees of the craft needed from the Rock Island or Milwaukee should apply for such vacancies. Eligible employees of the Rock Island or Milwaukee interested in such vacancies shall have the responsibil-

ity of applying to the carrier for vacancies in the manner described by the carrier. An employee shall have 7 days to apply after receipt of notice from the carrier or the organization or 20 days after the labor organization has received notice from the carrier, whichever occurs first, subject to paragraph 9 hereof. To the extent that the carrier has determined a need for additional employees under this Article, applicants will be required to meet those physical and rules standards which the carrier applies to its own employees on reexamination. The applicant's seniority in the appropriate craft and seniority district on the bankrupt carrier will prevail if the number of qualified applicants exceeds the carrier's determined need for additional employees. Bankrupt carrier employees who are in service with a bankrupt carrier at the time of interim operation or purchase and who are hired on the commencement of operations by a purchasing carrier pursuant to this agreement will be presumed qualified physically and purchasing carrier will have the burden of proof if it wishes to challenge such qualifications.

Those employees who are subject to examination on purchasing carrier's operating book of rules may be required to pass a re-examination on those rules.

5. *Duration of Preferential Hiring*—The procedures established in this Article shall continue in full force and effect for not less than one year from the effective date from the commencement of operations or as otherwise provided for by law, but in no event beyond April 1, 1984.

6. *Employee Election*—An eligible employee of the Rock Island or Milwaukee afforded the first right of hire pursuant to this Article by more than one carrier signatory hereto shall have the option to elect on which carrier the employee will exercise such right. Should a transaction involving another purchasing carrier occur subsequent to the employee's initial election which the employee finds is preferable, the employee will have one opportunity to be hired by another purchasing carrier.

7. *Termination of Seniority*—When final agreement has been reached pursuant to Paragraph 9 of this Article dealing with seniority, those Rock Island and Milwaukee employees who are hired by a purchasing carrier will be considered as having severed their employment relationship with their former employer.

8. *Application of Work Rules*—

(a) A purchasing carrier shall not take over or assume any of the contracts, schedules or agreements in effect between the Rock Island or Milwaukee and its employees concerning rates of pay, rules, working conditions or fringe benefits, and shall not be bound by the terms and provisions thereof.

(b) An employee of the Rock Island or Milwaukee hired by a purchasing carrier shall come under the coverage of all contracts, schedules and agreements in effect between such carrier and its employees concerning rates of pay, rules, working conditions and fringe benefits, and shall be bound by the terms and provisions thereof in the same manner and to the same extent as other employees of the purchasing carrier working in the same craft.

(c) The purchasing carrier shall have the option:

(1) to commingle, under the purchasing carrier's work rules, work in connection with lines acquired from the Rock Island and/or the Milwaukee with work in its existing seniority districts, including expansion of those seniority districts to encompass the acquired lines; and where there are agreed-upon switching limits for yards at a common point, switching limits of the purchasing carrier will be extended to include the switching limits of the acquired property; or

(2) to operate the acquired property as a separate seniority district or districts under the purchasing carrier's work rules.

### 9. *Implementing Agreement—*

(a) In accordance with the option selected under paragraph 8 of this Article, agreements will be reached on each purchasing carrier concerning the manner in which seniority will be allocated in filling additional job assignments, between the purchasing carrier's employees and the bankrupt carrier employees hired by the purchasing carrier. In the absence of an agreement, in order to avoid delay in operations, the purchasing carrier may, on a temporary basis, hire qualified and available bankrupt carrier employees to the extent needed where additional jobs are established at the outset. Such employees will be placed at the bottom of the current list of active employees, and they will remain in such status until an agreement is reached respecting seniority in accordance with the provisions of this paragraph. Where no additional jobs are established, the purchasing carrier's present employees' jobs may be expanded to include work on or in connection with the acquired property. If, as a result of the agreement on allocation of seniority, bankrupt carrier employees used on such a temporary basis do not secure jobs with the purchasing carrier, their employment with the purchasing carrier will be terminated without any preservation of rights or benefits with the purchasing carrier.

(b) If an agreement is not reached within ten (10) days from the date of the notification given under Article I, paragraph 3 hereof, either party to the dispute may utilize the following procedures for determining the allocation of seniority referred to above:

(1) Within five (5) days after notice in writing from one party to another that it desires to arbitrate the dispute, the parties shall select a neutral referee and in the event they are unable to agree upon the selection of said referee, then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding, and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne in accordance with the Railway Labor Act.

Notwithstanding any of the foregoing provisions of this section, the purchasing carrier may proceed with the transaction, provided that all hired bankrupt carrier employees shall be provided with all of the rights and benefits of this agreement.

(c) An employee hired by a purchasing carrier in one craft but who also has seniority in another craft with Rock Island or Milwaukee, such as a yardmaster who also has seniority as a yardman, will be given seniority in both crafts on the purchasing carrier. This issue will be handled in the negotiations under paragraph (a) hereof.

(d) The issue of seniority date and service date where an employee transferred from one roster or craft to another on the bankrupt carrier will be handled in the negotiations under paragraph (a) hereof.

(e) Special projects—Protection, seniority and contracting (pursuant to existing agreements) in special rehabilitation projects will be subject to negotiations between individual purchasing carriers and interested employee representatives.

### **Article III. Monthly Compensation Guarantee**

1. *Coverage*—A purchasing carrier will provide a monthly compensation guarantee, as hereafter provided, only to bankrupt carrier employees hired by the purchasing carrier pursuant to this agreement and to its own employees who are (1) working in the same seniority district in the zone or working district of the acquired property and (2) are in active service on the date that interim operation is begun or purchase completed, whichever first occurs.

2. *Duration*—Each employee described in paragraph 1 of this Article shall be entitled to receive a monthly compensation

guarantee payment for a total of not more than 36 months from the date employee makes a claim for it, except that:

(a) the period of entitlement to a guarantee payment shall not exceed the employee's total months of service prior to date interim operation is begun or purchase completed, whichever first occurs, with the bankrupt or the purchasing carrier, as the case may be; and

(b) payments of this type received from a bankrupt carrier, or any interim service operator, or a purchasing carrier or under supplementary unemployment insurance (such as Section 10 of Milwaukee Railroad Restructuring Act) all count toward the limit on the total number of months as set forth above; and

(c) no compensation shall be provided under this section after April 1, 1984, unless it is necessary in order to provide an employee with at least eight (8) months of the payments, but after such date, that employee shall receive the eight-month minimum only if that employee is not employed continuously after that date.

3. *Guarantee*—the monthly compensation guarantee shall be an amount equal to:

(a) 80 percent of an employee's average monthly straight-time compensation (including all general wage increases negotiated nationally for railroad employees) earned from the Milwaukee (or purchasing carrier) during the period beginning June 1, 1977 and ending October 31, 1979, or from the Rock Island (or purchasing carrier) during the period June 1, 1977 and ending on May 31, 1979.

(b) In the case of an employee who served as an agent or a representative of a class or craft of employees on either a full- or part-time basis during the period set forth in subsection (a) above, 80 percent of the average monthly straight-time compensation (including all general wage increases negotiated nationally for railroad employees) of the employees actively employed in his class or craft involved immediately above and below him on the same seniority roster or 80 percent of his own average monthly straight-time compensation as computed in subsection (a) above, whichever is greater. This subsection (b) shall also be applicable to railroad officials, supervisory or fully exempt personnel who return to their respective crafts.

#### 4. *Payments and Offsets—*

(a) Each employee described in paragraph 1 of this Article shall be eligible to receive a monthly compensation guarantee payment for any month in which such employee's monthly compensation guarantee exceeds such employee's actual compensation for that month with an offset for any losses due to absences from service or account of injury, sickness, disability, or discipline for cause in accordance with existing agreements. In computing such offset the guarantee will be reduced proportionately on the basis of working days in the month. Claims for guarantee shall be paid within 30 days after date claim is filed, except in the case of the initial claim it will be paid within 90 days of filing.

(b) Notwithstanding other provisions of this agreement, the carrier may reduce the "monthly compensation guarantee" for each day lost under emergency conditions such as flood, snowstorm, tornado, cyclone, hurricane, earthquake, fire or strike, provided that operations are suspended in whole or in part and provided further that because of such emergencies the work which would be performed by the incumbents of the positions to be abolished or the work which would be performed by the employees involved cannot be performed. The reduction in monthly compensation guarantee will be reduced proportionately on basis of working days in the month.

(c) The sum of (A) the amount of any benefits payable to such employee for such month under the Railroad Unemployment Insurance Act or under any state unemployment insurance program, and (B) the amount of any earnings of such employee for such month from employment or self-employment which is first engaged in after the employee is adversely affected, may be used as an offset.

(d) The monthly compensation guarantee payment shall cease prior to the expiration of the period as set forth in paragraph 2 of this Article in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to exercise seniority on an

available position less than 125 railroad route miles from his or her residence, and for failure without good cause to accept a reasonably comparable position which does not require a change of residence, for which he is physically and mentally qualified, if his return does not infringe upon employment rights of other employees under a working agreement. "A change of residence" as used herein means a transfer to a work location which is located either (A) outside a radius of 30 miles of the employee's former work location and further from his residence than was his former work location or (B) is located more than 30 normal highway route miles from his residence and also further from his residence than was his former work location.

(e) If, for any reason, an interim service operator is denied Commission approval or court authorization for final sale or transfer of a line of a bankrupt carrier, or ceases to be an interim operator, or if a successor carrier agrees, or is ordered to, perform the functions formerly performed by the Rock Island or Milwaukee under an existing joint trackage agreement, the employment of bankrupt carrier employees who may be employed to fill the positions necessary for the operation of such service on such line may be terminated simultaneously with the cessation of that service, without preservation of rights or benefits with that purchasing carrier.

5. *Initiation*—The monthly compensation guarantee payment will be the responsibility of an interim service operator from the date of the start-up of interim operations until its proposed acquisition is allowed, denied or withdrawn, or until the employee's eligibility terminates, whichever occurs first. The successful purchaser will have responsibility for monthly compensation guarantees once the proposed transaction is consummated, until the employee's eligibility terminates.

6. *Elections*—Nothing in this agreement shall be construed as depriving any employee of the purchasing carrier whose employment relationship began prior to the effective date of this agreement of any rights or benefits or eliminating

any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, however, that if a protected employee otherwise is eligible for protection under both this agreement and some other job security or other protective conditions or arrangements, he shall elect between protection under this agreement and, for so long as he continues to be protected under the arrangement which he so elects, he shall not be entitled to any protection or benefit (regardless of whether or not such benefit is duplicative) under the arrangement which he does not so elect; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of his protective period under that arrangement.

7. *Seasonal Work*—In computing the monthly compensation guarantee for employees who, during the period beginning June 1, 1978 and ending on May 31, 1979, did not hold a job on a year-round basis due to seasonal requirements, their monthly compensation guarantee will be computed using the actual number of months assigned to work in such period. Such guarantee as thus computed will apply to the same number of months each year after commencing work with a purchasing carrier.

#### Article IV. Miscellaneous

1. *Effect of Severance Payment*—This agreement shall not apply to any bankrupt carrier employee who has elected to receive a severance payment under any other protective conditions or agreement.

2. *Health and Welfare Coverage*—The purchasing carrier will pay a premium under the national health and welfare, dental and supplemental sickness plan, for the first month of employment of bankrupt carrier employees accepting employment pursuant to this agreement with the purchasing carrier.

3. Milwaukee or Rock Island employees accepting employment with a purchasing carrier pursuant to this agreement will be given credit for service with the former employer in computing vacation qualification, entry rates and sick leave.

4. This agreement shall be construed as a separate agreement by and on behalf and each of the carriers signatory hereto and its employees represented by each of the organizations signatory hereto.

Signed at Washington, D.C., this 4th day of March, 1980.

## APPENDIX F

Rail Passenger Service Act, 45 U.S.C. § 501, *et seq.*

### § 565. Protective arrangements for employees

(a) **Duty of railroads; discontinuance of intercity rail passenger service.** A railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies, affected by discontinuances of intercity rail passenger service whether occurring before, on, or after January 1, 1975. A "discontinuance of intercity rail passenger service" shall include any discontinuance of service performed by railroad under any facility or service agreement under sections 305 and 402 [45 USCS §§ 545, 562] of this Act pursuant to any modification or termination thereof or an assumption of operations by the Corporation.

(b) **Substantive requirements for protection.** Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act. Any contract entered into pursuant to the provisions of this title shall specify the terms and conditions of such protective arrangements. No contract under section 401(a)(1) of this Act [45 USC § 561(a)(1)] between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees fair in-

cluding affected terminal employees, and equitable protection by the railroad.

(c) **Commencement of protection.** Upon commencement of operations in the basic system, the substantive requirements of subsections (a) and (b) of this section shall apply to the Corporation and its employees in order to insure the maintenance of the protective arrangements specified in such subsections, except that nothing in this subsection shall be construed to impose upon the Corporation any obligation of a railroad with respect to any right, privilege, or benefit earned by any employee as a result of prior service performed for such railroad. The Secretary of Labor shall certify that affected employees of the Corporation have been provided fair and equitable protection as required by this section within one hundred and eighty days after assumption of operations by the Corporation.

(d) **Obligations of contractors; minimum wages; labor, health, and safety standards.** The Corporation shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors and subcontractors in the performance of construction work financed with the assistance of funds received under any contract or agreement entered into under this title [45 USC §§ 561 et seq.] shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act. The Corporation shall not enter into any such contract or agreement without first obtaining adequate assurance that required labor standards will be maintained on the construction work. Health and safety standards promulgated by the Secretary of Labor pursuant to section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333) [40 USC § 333] shall be applicable to all construction work performed by a railroad employee. Wage rates provided for in collective bargaining agreements negotiated under and pursuant to the Railway Labor Act shall be considered as being in compliance with the Davis-Bacon Act.

**(e) Contracts not to result in layoff.** The Corporation shall not contract out any work normally performed by employees in any bargaining unit covered by a contract between the Corporation or any railroad providing intercity rail passenger service upon the date of enactment of this Act [enacted Oct. 30, 1970] and any labor organization, if such contracting out shall result in the layoff of any employee or employees in such bargaining unit.

**(f) Free or reduced-rate transportation for railroad employees; single systemwide schedule of terms and compensation; reimbursement of Corporation by railroads; retroactive relief after October 1, 1981; "railroad employee" defined.** The Corporation shall take such action as may be necessary to assure that, to the maximum extent practicable, any railroad employee eligible to receive free or reduced-rate transportation by railroad on April 30, 1971, under the terms of any policy or agreement in effect on such date will be eligible to receive, provided space is available, free or reduced-rate transportation on any intercity rail passenger service provided by the Corporation under this Act, on terms similar to those available on such date to such railroad employee under such policy or agreement. However, the Corporation may apply to all railroad employees eligible to receive free or reduced-rate transportation under such policies or agreements, a single systemwide schedule of terms determined by the Corporation to reflect terms applicable to the majority of such employees under those policies or agreements in effect on April 30, 1971. Unless the Corporation and a railroad or group of railroads agree on a different basis for compensation, the Corporation shall, during the 2-year period beginning on the effective date of the Amtrak Reorganization Act of 1979 [enacted Oct. 1, 1979], be reimbursed by each railroad at the rate of 25 percent of the systemwide average monthly yield per revenue passenger mile. Reimbursement at this rate is in lieu of any charges for liability incident to travel of railroad employees eligible for free or reduced-rate transportation and any other costs incurred by the Corporation in connection with free or reduced-

rate transportation [and any other costs incurred by the Corporation in connection with free or reduced-rate transportation.] Nothing in this subsection, shall preclude the Commission from ordering retroactive relief in any proceeding instituted or reopened after October 1, 1981. As used in this subsection, the term "railroad employee" means (1) an active full-time employee, including any such employee during a period of furlough or while on leave of absence, of a railroad or terminal company, (2) a retired employee of a railroad or terminal company, and (3) the dependents of any employee referred to in clause (1) or (2) of this sentence.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1983

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

*Petitioner,*

v.

RICHARD B. OGILVIE, Trustee Of The Property Of The  
Chicago, Milwaukee, St. Paul & Pacific Railroad Company,  
BURLINGTON NORTHERN, INC., and the UNITED  
STATES OF AMERICA.

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF IN OPPOSITION OF  
RICHARD B. OGILVIE, TRUSTEE,  
AND BURLINGTON NORTHERN, INC.**

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Date: February 18, 1984

## QUESTIONS PRESENTED:

In the opinion of the Trustee and BN\* the following questions are presented by the RLEA's petition:

1. Does the traditional and broad discretion of a railroad reorganization court to defer payment of claims against a railroad in reorganization allow deferral of *New York Dock*\*\* labor protection claims during the reorganization?

2. Did the Milwaukee railroad reorganization court have the authority, under legislation which specifically empowered it to provide for the protection of employees affected by sales of Milwaukee railroad properties, to interpret, at the request of affected employees, an arrangement made among purchasing carriers, the Trustee and their employees for the protection of employees affected by sales of Milwaukee railroad properties?

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\* "Trustee" refers to the Respondent Richard B. Ogilvie, Trustee of the Property of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Debtor, and "BN" refers to Respondent Burlington Northern, Inc.

\*\* See p. 4, *infra*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**BRIEF IN OPPOSITION OF  
RICHARD B. OGILVIE, TRUSTEE,  
AND BURLINGTON NORTHERN, INC.**

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Respondents Richard B. Ogilvie ("Trustee"), Trustee of the Property of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Burlington Northern, Inc. ("BN"), respectfully request that this Court deny Petitioner Railway Labor Executives' Association's ("RLEA") petition for a writ of certiorari in the above proceeding.

**OPINIONS BELOW AND JURISDICTION**

The Trustee and BN adopt those portions of the Petition entitled "Opinions Below" and "Jurisdiction."

## STATUTES INVOLVED

The Trustee and BN adopt that portion of the Petition entitled "Statutes Involved," but add that this case involves questions concerning the discretion of a United States District Court sitting as a Railroad Reorganization Court under Section 77 of the Bankruptcy Act of 1898, as amended, 11 U.S.C. § 205 (1976) (repealed effective 1979). Relevant portions of this statute are reproduced in Appendix A hereto.

## STATEMENT OF THE CASE

### I. The Milwaukee Road Bankruptcy.

After incurring losses of over \$100,000,000 in 1975 through 1977, the Milwaukee Road<sup>1</sup> entered reorganization on December 19, 1977.<sup>2</sup> In 1978, the Milwaukee lost \$82 million from operations and was losing money at twice that level in 1979, maintaining operations by borrowings under Section 77(c)(3). By the Fall of 1979, both the United States Court of Appeals for the Seventh Circuit<sup>3</sup> and the Reorganization Court<sup>4</sup> had determined the Milwaukee to be cashless,<sup>5</sup> restricted

<sup>1</sup> The Chicago, Milwaukee, St. Paul & Pacific Railroad Company shall hereinafter be referred to as "Milwaukee" or "Milwaukee Road;" the United States District Court for the Northern District of Illinois, Eastern Division, the Honorable Thomas R. McMillen presiding in case No. 77 B 8999 as the "Reorganization Court;" Chapter VIII of the Bankruptcy Act of 1898, as amended, 11 U.S.C. § 205 (1976) (repealed effective 1979) as "Section 77;" The Milwaukee Railroad Restructuring Act, 49 U.S.C. §§ 901-22 (Supp. III 1979) as "MRRRA"; orders of the Reorganization Court as "Orders" and *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 611 F.2d 662 (7th Cir. 1979) as "*Embargo Decision*."

<sup>2</sup> The Milwaukee Road reorganization proceeding continues to be governed by Section 77, with certain modifications not pertinent to this Petition. Pub. L. No. 95-598 § 403, 92 Stat. 2682 (Nov. 6, 1978).

<sup>3</sup> *Embargo Decision* at 669-70.

<sup>4</sup> Order No. 220 C, Appendix B to Brief of Trustee and BN at 11b.

<sup>5</sup> See *In re Penn Central Transportation Co.*, 384 F. Supp. 895, 919 n. 31 (Sp. Ct. R. R. R. Act 1974) (defining "cashlessness").

borrowings<sup>6</sup> to a potentially reorganizable core and embargoed operations on non-core lines, including the lines ultimately sold to BN and Union Pacific ("UP") as of November 1, 1979.<sup>7</sup> Employees working on these non-core lines and operations were "furloughed"—that is, they were laid off without any further pay and without any employee protection.<sup>8</sup>

## II. The Milwaukee Railroad Restructuring Act, the Section 9 Agreement, and the March 4 Agreement.

The embargo was only a partial expedient. The Milwaukee's service obligations had to be formally "abandoned" and the Trustee's responsibilities required him to seek to sell embargoed lines for continued operation whenever possible. At the time of the embargo, abandonments of service by railroads and sales of lines for continued operation required lengthy proceedings before and approval by the Interstate Commerce Commission ("ICC").<sup>9</sup> In addition, protections for employees affected by the transactions were required.

Protections required by the ICC in abandonments and sales vary to fit the circumstances.<sup>10</sup> See, e.g., *New York Dock Railway v. United States*, 609 F.2d 83, 91-92 (2d Cir. 1979) (upholding imposition of wages and fringe benefits for up to six years but noting that benefits may vary); *Wellsville, Addison & Galeton Railroad Corp.,—Abandonment*, 354 I.C.C. 744 (1978) (no protection).

<sup>6</sup> Section 77(c)(3).

<sup>7</sup> Order No. 220 C, Appendix B to Brief of Trustee and BN at 12b.

<sup>8</sup> *Id.*

<sup>9</sup> Section 77(o); Interstate Commerce Act, 49 U.S.C. §§ 10903-06 and 11351 (Supp. III 1979).

<sup>10</sup> 49 U.S.C. § 11347 governs labor protection in sales. By virtue of § 11341, the Commission's duty under § 11347 to provide protection is exclusive. 49 U.S.C. § 11341. Abandonments other than those governed by special statutes, such as MRRRA, are carried out under 49 U.S.C. § 10903 (Supp. III 1979). Section 10903(b)(2) requires protective conditions at least as beneficial to the interest of employees as those established under § 11347.

In typical abandonments, "*Oregon Short Line*"<sup>11</sup> conditions are imposed. These provide for maintenance of an employee's wage and benefit levels for a period of up to six years as well as certain other benefits. Estimates of *Oregon Short Line* claims which would arise out of the abandonment of all Milwaukee non-core operations varied from \$300 million to \$1.2 billion with the most likely estimate being \$350 million. *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 658 F.2d 1149, 1156 (7th Cir. 1981), cert. denied, 455 U.S. 1000 (1982). This liability would have precluded any attempt to reorganize any part of the railroad, *id.*, and payments to employees for labor protection would have been delayed while the question of their validity was litigated through the courts. *Id.* Neither the public interest in continued rail service nor the interest in protecting rail employees from the hardships of being laid off would have been served.

In typical sales "*New York Dock*"<sup>12</sup> protections are given employees of the selling and purchasing carrier. These are equivalent to *Oregon Short Line* protections for employees of both the purchasing and selling carriers. The existence of these potentially great costs was interfering with the Trustee's efforts to sell lines to other railroads for continued operation.

In late 1979, Congress passed the MRRRA. Sections 5, 9, and 17 of the MRRRA, 45 U.S.C. §§ 904, 908 and 917, provide opportunities for the negotiation of alternate labor protection agreements to facilitate reorganization and sale efforts while providing adequate protections for employees. Two such agreements were negotiated. The "Section 9 Agreement" was negotiated between the Trustee and representatives of the Milwaukee Road's labor unions. It provides affordable and immediately payable benefits of up to \$25,000 to Milwaukee Road employees adversely affected by restructuring activities

<sup>11</sup> *Oregon Short Line R.R. — Abandonment*, 360 I.C.C. 91 (1979).

<sup>12</sup> *New York Dock Ry. — Control*, 360 I.C.C. 60 (1979), *aff'd sub nom.*, *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

who do not wish to await payment of New York Dock Benefits pending the reorganization process. The "March 4 Agreement", Appendix E to Petition, was negotiated between the Trustees of the Milwaukee Road and the Chicago, Rock Island and Pacific Railroad, their labor unions, and other railroads, including BN and UP, potentially interested in acquiring lines of the Milwaukee Road or the Rock Island under Section 5 or 17 of the MRRA. Those sections require employee protection as beneficial as that provided under 49 U.S.C. § 11347. Section 11347 in turn provides that "the [labor protection] arrangement may be made by the rail carrier and the authorized representative of its employees."

The March 4 Agreement established the total employee protection responsibility for any carrier purchasing property from the Milwaukee. It was expressly made "pursuant to the Milwaukee Railroad Restructuring Act (45 U.S.C. Sec. 901 et seq.) and the Interstate Commerce Act (49 U.S.C. Sec. 10101 et seq.)" Appendix E to Petition at 31a, and it contained specific provisions establishing the nature of the income protection arrangements for existing employees of purchasing carriers as well as for newly hired employees formerly working for the Milwaukee or Rock Island railroads.

With regard to existing employees of the purchasing carriers, the March 4 Agreement provided a "monthly compensation guarantee" for three years at 80% of their previous average earnings. In addition, it provided that the "monthly compensation guarantee" would "*only*" be provided "to bankrupt carrier employees hired by the purchasing carrier pursuant to this agreement and *to its own employees* who are (1) working in the same seniority district in the zone or working district of the acquired property and (2) are in active service on the date that interim operation is begun or purchase completed, whichever first occurs." *Id.* at 37a (emphasis added).

The compensation guarantee for a purchasing carrier's employees was limited to those working in the seniority districts where properties were acquired because they were the employees who were most likely to be affected by purchases. The exclusion of other employees from the protection arrangement was consistent with the substantially reduced protection for the existing employees who were most likely to be affected by the purchases.

### III. The Sales.

In March of 1980 the Milwaukee agreed to sell to BN 30 parcels of tracks and yards involving about 400 miles of track for \$21 million. The Trustee also agreed to sell to UP eight yard and track segments for about \$19 million. All of this railroad property had previously been abandoned under Section 5(a) of the MRRRA, 45 U.S.C. § 904(a). The Reorganization Court gave its preliminary approval to each sale and authorized the carriers, pursuant to Section 5(b)(3) of the MRRRA, to operate the properties pending ICC approval.

BN's application to the ICC for approval of its purchase listed each location where any change in the level of employment had or would occur as a result of the purchase. No positions were reported as being "consolidated," "transferred" or "abolished" as a result of the transaction. In addition, the application presented the March 4 Agreement to the ICC and stated that "under the March 4, 1980 Labor Protective Agreement (March 4 Agreement) BN employees in active service in zones or districts where former Milwaukee personnel are employed for additional job assignments will be the beneficiaries of a monthly compensation guarantee."

The ICC approved the purchase application in an order issued on August 21, 1980. *Burlington Northern Inc.*—

*Purchase*, 363 I.C.C. 298 (1980). The ICC referred to the March 4 Agreement and found that "the interest of Railway Labor will be adequately protected with regard to the BN and UP purchases." *Id.* at 312. The ICC also referred to the authority of the Reorganization Court under MRRA to impose employee protection conditions, but it did not condition its approval on additional protection to employees, nor did it recommend or suggest that additional protection be provided.

Initially upon approving the sales involved in this case, the Reorganization Court found that the Trustee's obligation to Milwaukee employees was controlled by its Orders in the abandonments of the lines sold and that labor protection was not required under the MRRA for employees of the acquiring carriers. Order No. 409, Appendix B-2 to Petition.

The RLEA appealed that order to the Seventh Circuit in Case No. 80-2735. The parties then agreed to a limited remand of that appeal for purposes of reconsidering Order 409 as it dealt with employee protection. 7th Cir. No. 80-2735 Order dated May 26, 1981.

As the parties had done when the matter was first before the Reorganization Court, BN maintained that the March 4 Agreement was designed to state the purchasing carrier's complete employee protection responsibility while RLEA maintained that the Agreement was not a complete agreement and that it did not intend to exclude employees working outside of purchase zones from protection. RLEA was accorded an evidentiary hearing and it introduced an affidavit as to the intent and effect of the March 4 Agreement.

At no time in either proceeding before the Reorganization Court in which the intent and scope of the March 4 Agreement was in issue did RLEA suggest that the Reorganization Court did not have the jurisdiction to resolve that question or that arbitration should be used.

Upon reconsideration of Order 409, the Reorganization Court provided New York Dock protections for the benefit of Milwaukee Road employees, with certain modifications not at issue in this petition. See, Order 409-A Appendix to Petition at 2a (adopting conditions in Appendix B of the Special Master dated February 20, 1980. These conditions are New York Dock type of protections.) The Reorganization Court also adopted the labor-protection benefits of the March 4 Agreement for Milwaukee, BN and UP employees working in the seniority districts in which the lines sold were located. In addition the Reorganization Court found that BN and UP employees not working in the seniority districts of the lines sold were excluded from protection under the March 4 Agreement. The Reorganization Court, as it had previously deferred payment of Oregon Short Line claims in approving abandonment of these lines, deferred payment of the New York Dock Benefits to a later date. See *In Re Chicago, Milwaukee*, 658 F.2d 1149, at 1156-60.

The RLEA appealed the findings (1) that BN and UP employees not working in the seniority districts of the lines sold were excluded from protection and (2) that payment of New York Dock Benefits to Milwaukee employees be deferred. The Court of Appeals for the Seventh Circuit affirmed the judgment of the Reorganization Court. *In the Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, Nos. 80-2735, 82-1637 (July 15, 1983), Appendix C to Petition.

## REASONS FOR DENYING THE WRIT

### I. Deferral Of Payment Of New York Dock Benefits

#### A. Deferral Does Not Conflict With Decisions Of This Or Any Other Court.

The Reorganization Court's deferral of payment of New York Dock benefits was an exercise of its discretion under Section 77 and the Seventh Circuit affirmed the deferral as an exercise of that discretion. Appendix E to Petition at 18a. This Court has consistently recognized that a railroad reorganization court has unusually broad discretionary powers over the conduct of the reorganization proceeding and the conduct of the bankrupt railroad's business in order to bring about reorganization of a railroad as a viable enterprise. *See, e.g., Continental Illinois National Bank & Trust Co. v. Chicago Rock Island & Pacific Railway Co.*, 294 U.S. 648, 675-76 (1935) ("*Continental Bank*"). This Court and courts of appeals have consistently recognized that payment of claims extant at the time the petition for reorganization is filed may be deferred. *Id.* at 676-77; *In re Boston and Maine Corp.*, 600 F.2d 307, 310-13 (1st Cir. 1979). Courts have also consistently recognized that payment of claims arising after the petition is filed may be deferred in the interest of the reorganization, including those with cost of administration status. *See, e.g., In re Penn Central Transportation Co.*, 553 F.2d 12, 16 (3d Cir. 1971), (payment of current taxes); *In re Penn Central Transportation Co.*, 400 F.Supp. 920, 925-26 (E.D. Pa. 1975) (operating expenses). *Cf. In re Penn Central Transportation Co.*, 484 F.2d 1300, 1304-05 (3d Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (reduction of unfunded pension liability upheld as an equitable exercise of court's discretion).<sup>13</sup> Clearly, the decision below is

<sup>13</sup> The only area where there is some dispute as to the discretion of the Reorganization Court is in the area of interline per diem account settlements. Compare *In re Chicago, Rock Island & Pacific Railroad Co.*, 537 F.2d 906 (7th Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977) with *In re Boston & Maine Corp.*, 600 F.2d 307 (1st Cir. 1979).

consistent with the only other decision on the deferability of labor protection benefits—that of the Seventh Circuit previously in this proceeding. *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 658 F.2d 1149, cert. denied, 455 U.S. 1000 (1982).

In short, the Seventh Circuit's decision is consistent with the decisions of this and other courts. There is no need for this Court to review the decision to resolve a conflict between courts.

**B. This Case Does Not Present An Important Question Of Law Which Should Be Decided By This Court.**

Almost exactly two years ago this Court was asked by RLEA to review the deferral of payment of traditional labor protection claims in connection with large scale abandonments of Milwaukee Road lines. Thousands of employees, hundreds of millions of dollars in claims, and the possibility of reorganization of the Milwaukee Road at all were at stake. While the authority of a reorganization court to defer payment of claims, was clearly established, the MRRRA was a new and uninterpreted law, and the issue of deferral of payment of labor protection was a novel one. Yet this Court, properly, declined to review the rulings below. *RLEA v. Ogilvie*, 455 U.S. 1000 (1982).

The factual and legal issues involved have, if anything, become less important since then.<sup>14</sup> The reorganization of the

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<sup>14</sup> The only change in the legal setting is this Court's decision invalidating provisions of the Rock Island Transition and Employee Assistance Act, 45 U.S.C. §§ 1005 and 1008, as a non-uniform bankruptcy law. *RLEA v. Gibbons*, 455 U.S. 457 (1982). Those sections provided labor protection to former employees of the Rock Island. It is the Trustee's position that the MRRRA, unlike the RITA, is

(Footnote continued on next page)

Milwaukee Road is drawing to a close, as are the few other railroad reorganizations still ongoing under Section 77. The few employees with deferred claims are likely to be paid starting in 1985, which would make any decision advisory. Section 77 has been repealed and the MRRA only applies in Section 77 reorganizations. If similar circumstances should arise in a subsequent railroad reorganizations, the statutory context will be different. Therefore this case would have little precedential value. No purpose would be served by consideration by this Court.

**C. The Writ Should Not Be Granted Simply  
To Review the Reorganization Court's  
Exercise Of Its Discretion.**

RLEA concedes that the Reorganization Court had the discretion to defer payment, but argues that it should have come to a different conclusion in exercising its discretion. Thus what the RLEA is really asking this Court to do is to substitute its judgment for that of the courts below. Petition at 20. The RLEA would have this Court review the facts and history of this case and substitute its judgment for that of the courts below. This is not sufficient reason for granting a writ of certiorari, particularly as there is no real dispute as to the factual finding in this case. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). This Court stated in *Continental Bank* at 677:

a claim [by creditor] that injurious consequences will result . . . may not, of course, be disregarded by the district court; but it represents a question addressed not to the

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*(Footnote continued from preceding page.)*

a valid law under the Commerce Power. However, this appeal does not involve the sections of the MRRA providing labor protection to Milwaukee Road employees. it involves the discretion of the Reorganization Court under Section 77 to defer benefits arising out of the Interstate Commerce Act. Therefore, the uniformity of the MRRA is not at issue.

power of the court but to its discretion—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised.

This is not a case for such interference.

## II. March 4 Agreement.

RLEA also states that certiorari should be granted because the Court of Appeals and the lower court erred when they interpreted the March 4 Agreement<sup>15</sup> RLEA says that the

<sup>15</sup> RLEA suggests, but does not raise as an issue worthy of certiorari, that the Reorganization court's interpretation of the March 4 Agreement as intentionally excluding employees working outside of purchase zones was incorrect. For the reasons stated in the Court of Appeals' opinion, the interpretation was clearly correct.

RLEA also implies that the result below was inconsistent with the requirement of Section 5(b)(1) that employee protections imposed by the court be at least as protective of the interests of employees as that required under Section 11347 of the Interstate Commerce Act. 49 U.S.C. § 11347. However, under Section 9 of the MRRA as well as under Section 11347, labor organizations may enter into agreements which differ from the Section 11347 terms which would be imposed absent an agreement. The last sentence of Section 11347 provides that alternative protection "may be made by the rail carrier and the authorized representative of its employees . . . notwithstanding . . ." the substantive protection terms provided by the section. Indeed, it was under this provision that RLEA agreed to accept in the March 4 Agreement substantially less than Section 11347 protection for employees working in the territorial zones where purchases were made. RLEA does not assert here, and it did not assert below, that the March 4 Agreement does not fully comply with the requirements of Section 5(b)(1) of the MRRA with regard to these BN employees working in the territorial zones where purchases were made. RLEA did not challenge that protection arrangement even though it conceded that the protection provided for those employees is "less than one half of the economic protections mandated as a minimum under Section 11347." Brief for Appellant, RLEA at 21 (filed in this case in the Court of Appeals, No. 80-2735). RLEA stated that "Section 11347 of the Interstate Commerce Act, and *a fortiori* Section 5(b)(1) of the MRRA, gives labor and management the power to make such

(Footnote continued on next page.)

"Reorganization Court's foray into the area of interpreting Railway Labor Act agreements improperly usurped the exclusive jurisdiction of adjustment boards under the Railway Labor Act. . . ."

This argument, which RLEA made for the first time in the Court of Appeals, does not justify a grant of certiorari for two reasons:

1. The argument is plainly wrong. The March 4 Agreement was not simply a Railway Labor Act agreement. It found its source, purpose and authority in the MRRA, the Interstate Commerce Act and the unique circumstances of the Milwaukee reorganization. The March 4 Agreement states that it was made "pursuant to the Milwaukee Restructuring Act (45 U.S.C. Sec. 901 et seq.) and the Interstate Commerce Act (49 U.S.C. Sec. 10101 et seq.)" and makes no reference to the Railway Labor Act. If its interpretation and enforcement were not subject to the jurisdiction and control of the Reorganization Court, the purposes of the MRRA would be defeated. Unlike the typical Railway Labor Act agreement, agreements made pursuant to the MRRA must satisfy the broader requirements and purposes of that Act. Thus, the Reorganization Court is given the express authority to impose the agreement for protection of employees affected by sales of Milwaukee properties—an authority which logically and necessarily includes the authority to interpret protection agreements. Section 5(b)(1) provides:

*(Footnote continued from preceding page.)*

an agreement in lieu of Section 11347's statutory minimums, for the second sentence of Section 11347 provides: 'Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees.' The March 4 Hiring Agreement was entered into under that provision. . . ." *Id.* at 22.

In authorizing any such sale or transfer, *the court* shall provide a fair arrangement at least a protective of the interests of employees as that required under section 11347 of title 43 of the United States Code. (emphasis added)

Moreover, as the Court of Appeals correctly found, arbitration under the Railway Labor Act is a notoriously long and drawn out process<sup>16</sup> and, in these circumstances, a process which would provide less rather than more expertise in resolving the dispute. The Reorganization Court is intimately involved in every aspect of the Milwaukee operations, including its labor obligations.

Finally, because the ICC has "exclusive" jurisdiction over labor protection agreement made under Section 11347 (see 49 U.S.C. § 11341) the Reorganization Court must have the same authority with regard to labor protection agreements within its jurisdiction. Section 904 of the MRRRA transferred the ICC's responsibilities for labor protection to the Reorganization Court and although the ICC's may defer the resolution of employee protection contract disputes to arbitration boards, it has the ultimate power to resolve these disputes. The ICC's exclusive authority under Sections 11347 and 11341 (formerly Sections 5(2)(5) and 5(11)) supersedes the processes of the Railway Labor Act. *Brotherhood of Locomotive Engineers v. Chicago & North Western Rwy. Co.*, 314 F.2d 424 (8th Cir. 1963). See also *Norfolk and Western Railway Company v. Nemitz*, 404 U.S. 37 (1971) and *Anderson v. United Transportation Union*, 557 F.2d 165, 169 (8th Cir. 1977). There is no authority which holds that an arbitration board has exclusive jurisdiction over labor protection agreements made pursuant to Section 11347 and that the Commission has no subject matter jurisdiction.

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<sup>16</sup> As RLEA well knows, there is a large backlog even in the specially created public law boards established pursuant to the 1966 amendments to the Railway Labor Act. In fact, the National Mediation Board notified all neutral referees appointed to such boards to terminate all compensable service at one point last year when federal funding ran out.

2. The question raised by RLEA is not a significant one and it will not recur. The MRRA was passed to deal with the special circumstances of the Milwaukee and Rock Island reorganizations. The question of the power of the reorganization court to interpret the March 4 Agreement under the MRRA is not likely to recur. Moreover, the substantive result would not change even under RLEA's erroneous view of the narrow limits of the court's jurisdiction—the March 4 Agreement clearly did not contemplate that additional, full *New York Dock* protection would be available to the set of BN employees who were least likely to be directly affected by the purchase.

**CONCLUSION**

For the above reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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## **APPENDICES**

## **APPENDIX A**

### **PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES**

- A. Richard B. Ogilvie as Trustee of the Property of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Debtor.

Prior to reorganization proceedings, the Chicago Milwaukee Corporation was the parent of the Debtor owning approximately 96% of its common and preferred stock. The Trustee is vested with title to the assets of the Milwaukee Road and is empowered to operate its business and otherwise deal with its assets and properties, subject to the jurisdiction of the Reorganization Court. It is the Trustee's opinion that Chicago Milwaukee Corporation and its subsidiaries are neither parent nor affiliates because the Property of the Milwaukee Road is controlled by the Trustee and the Reorganization Court rather than Chicago Milwaukee Corporation.

- B. Burlington Northern, Inc. has no parent companies, affiliates or subsidiaries other than wholly owned subsidiaries and New Mexico and Arizona Land Company.

**APPENDIX B****STATUTES AND UNPUBLISHED OPINIONS  
RELIED UPON****BANKRUPTCY ACT OF 1898,  
11 U.S.C. § 205 (1976)**

[relevant subsections thereof set forth below.]

**§ 205. Reorganization of railroads engaged in interstate commerce**

- (a) Petition for reorganization by railroad, subsidiary or creditors; venue; proceedings thereon; jurisdiction of court over debtor and property

Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction the corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission"). When any railroad, although engaged in interstate commerce, lies wholly within one State, the proceedings shall be brought in the United States district court for the district in which its principal operating office has been located during the preceding six months or the greater portion thereof. The petition shall be accompanied by payment to the clerk of a filing fee of \$150. Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. If the petition is so approved, the court in which the order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive

jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in which the proceeding is pending, and any other rules which it may deem advisable in order to aid district courts and courts of appeal in exercising the jurisdiction herein conferred upon them. The railroad corporation shall be referred to in the proceedings as a "debtor". Any railroad corporation the majority of the capital stock of which having power to vote for the election of directors is owned, either directly or indirectly through an intervening medium, by any railroad corporation filing a petition as a debtor may file, with the court in which the other debtor has filed such a petition, and in the same proceeding, a petition, a copy of which shall also be filed at the same time with the Commission, stating that it is insolvent or unable to meet its debts as they mature, and that it desires to effect a reorganization in connection with, or as a part of the plan of reorganization of the other debtor; and upon the filing of the petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it if not so satisfied, and thereupon the court, if it approves the petition, shall have the same jurisdiction with respect to such debtor, its property and its creditors and stockholders, as the court has with respect to the other debtor. Creditors of any railroad corporation, having claims aggregating not less than 5 per centum of all the indebtedness of the corporation as shown in the latest annual report which it has filed with the Commission at the time when the petition is filed, may, if the corporation has not filed a petition under this section, file with the court in

which the corporation might file a petition under this section, a petition stating that the corporation is insolvent or unable to meet its debts as they mature and that the creditors have claims aggregating not less than 5 per centum of all such indebtedness of the corporation and propose that it shall effect a reorganization; copies of the petition shall be filed at the same time with the Commission and served upon the corporation. The corporation shall, within ten days after such service, answer the petition. If the answer admits the jurisdiction of the court and the material allegations of the petition, the judge shall enter an order approving the petition as properly filed if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if not so satisfied. If the answer denies either the jurisdiction of the court or any material allegation of the petition, the judge shall summarily determine the issues presented by the pleadings without the intervention of a jury, and if he finds that the material allegations are sustained by the proofs and that the petition complies with this section and has been filed in good faith, the judge shall enter an order approving the petition; otherwise, he shall dismiss the petition. If such a petition is so approved, the proceedings thereon shall continue with like effect as if the railroad corporation had itself filed a petition under this section. If a petition is dismissed, neither the petition nor the answer of a debtor constitute an act of bankruptcy or an admission of insolvency or of inability to meet maturing obligations or be admissible in evidence, without the debtor's consent, in any proceedings then or thereafter pending or commenced under this title or in any State or United States court. If, in any case in which the issues have not already been tried under the provisions of this subdivision, any of the creditors, prior to the hearing provided for in paragraph (1) of subdivision (c) of this section, appear and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, and, unless the material allegations of the petition are sustained by the proofs, shall dismiss the petition.

- (b) Plan of reorganization, contents; "securities," "stockholders," "creditors," "claims" defined; suspension of statutes of limitation

A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probably prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or

waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this title, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity

of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 96 of this title shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subdivision (p) of this section. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

**(c) Proceedings after approval of petition; orders of State regulatory bodies**

After approving the petition:

....

(2) The judge shall fix the amount of the bond of every trustee. He may thereafter terminate any such appointments on cause shown, and may in that event and in the event of a vacancy from any other cause, in the manner and within the qualifications herein provided for the appointment of trustees, appoint a substitute trustee or trustees, and in the same manner and within the same qualifications may appoint an additional trustee, and shall fix the amount of the bond of every such substitute or additional trustee or trustees. The judge shall in his discretion confirm the appointment of such legal counsel for the trustees as they shall select, with power of removal.

12-2111  
The trustee or trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable. The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor. In operating the business of the debtor with respect to safety, location of tracks, and terminal facilities, the trustee or trustees shall be subject to lawful orders of State regulatory bodies of statewide jurisdiction to the same extent as would the debtor if a petition respecting it had not been filed under subdivision (a) of this section except that (A) any such order which would require the expenditure, or the incurring of an obligation for the expenditure, of money from the debtor's estate shall not become effective (a) unless the trustee or trustees, with the approval of the court, shall consent thereto, or (b) unless the Commission, upon appropriate application or applications by an interested party or interested parties, shall find that compliance with the order will not impair the ability of the trustee or trustees to perform his or their duties to the public, will not constitute an undue burden upon interstate commerce, will be compatible with the public interest, and will not interfere with the formulation and approval of a satisfactory plan of reorganization for the debtor, and (B) compliance shall be made with any applicable provision of the Interstate Commerce Act. Prior to the appointment of a trustee,

the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe.

(3) The judge may, upon not less than fifteen days' notice published in such manner and in such newspapers as the judge may in his discretion determine, which notice so determined shall be sufficient, for cause shown, and with the approval of the Commission, in accordance with section 20a of title 49, as now or hereafter amended, authorize the trustee or trustees to issue certificates for cash, property, or other consideration approved by the judge, for such lawful purposes and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, or receivership charges, as might in an equity receivership be lawful. Where such certificates are authorized to provide funds to pay for the acquisition, assembly or installation of safety equipment or materials related thereto, or for the purpose of reimbursing the trustee or trustees for funds so expended, the judge may direct (without limitation of his power to make such direction in the absence of this provision) that the certificates shall have such lien on the property of the debtor and shall be entitled to such priority in payments over existing obligations, secured or unsecured, and receivership charges and present or future duties, debts or taxes or other obligations in favor of or payable to any State or any subdivision, agency or instrumentality thereof and interest or penalties, and to such parity with all or any portion of the other costs or expenses of administration or operation as in the particular case the judge may find equitable at the time of author-

izing the issuance of such certificates, regardless of whether such obligations, charges, costs or expenses, duties, debts, or taxes constitute or are secured by liens on real or personal property or shall have become payable before or after the issuance of such certificates.

**(o) Abandonment or sale of lines or property**

The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest; and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act, as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subdivision at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. The expense of such sale shall be borne in such manner as the judge may determine to be

equitable. The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage.

## IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

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IN THE MATTER OF  
CHICAGO, MILWAUKEE, ST.  
PAUL AND PACIFIC RAIL-  
ROAD COMPANY

*Debtor.*

In Proceedings for the Reor-  
ganization of a Railroad

No. 77 B 3999

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## ORDER No. 220C

In accordance with Order No. 220A dated September 27, 1979, this Court's decision dated the same date, and the decision of the Court of Appeals for the Seventh Circuit in *In Re Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, Nos. 79-1494, 79-1675, 79-1683, 79-1698 (7th Cir. Oct. 2, 1979), IT IS HEREBY ORDERED that:

1. Richard B. Ogilvie, as Trustee of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company is directed to embargo at 12:01 a.m., C.D.T., on November 1, 1979 all of the Debtor's freight operations on lines which are not shown on Appendix A, either as solid or dotted lines, nor listed on Appendix B, or Appendix C.

2. The Trustee shall notify the Interstate Commerce Commission of the possible need to direct service over the embargoed lines pursuant to 49 U.S.C. § 11125 and such other authority as the Commission may have and shall consult with the Commission with respect to measures for implementing such service.

3. The Trustee is authorized to file notices of proposed embargoes on all lines not shown on Appendix A, or

listed on Appendix B or Appendix C, or any other notices appropriate under the Interstate Commerce Act and to request the Interstate Commerce Commission and the Association of American Railroads to issue appropriate car service orders.

4. The Trustee shall continue all services and operations not embargoed by this Order and payments under all equipment obligations including leases. Order No. 1 and subsequent Orders in this proceeding shall remain in effect except to the extent that they are inconsistent with this Order.

5. As of November 1, 1979, or as soon thereafter as is practical, the Trustee shall furlough all employees not required for the services and operations continued under paragraph 1 or for the administration of the estate, the protection of the Debtor's property or the finalization, approval and implementation of a plan of reorganization. The Trustee shall suspend all payments and other benefits to furloughed employees pending the approval of a reorganization plan, except that the Trustee shall pay all furloughed employees for services performed up to the date of furlough at the rate at which payments were actually being made prior to the date of furlough and shall provide medical and dental protection to furloughed non-union employees in accordance with the Debtor's existing plan for the period of such protection provided therein.

6. The Trustee, as far as possible, shall prevent lines over which directed service is to be directed from becoming impassable and shall attempt to seek waivers from the Federal Railroad Administration of the necessity to comply with FRA minimum track standards where the track does not meet those standards.

ENTER:

THOMAS R. McMILLEN

Thomas R. McMillen

*Judge, U.S. District Court*

DATED: October 26, 1979

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No. 83-972

Office - Supreme Court, U.S.  
**FILED**  
**MAR 2 1984**  
**ALEXANDER L. STEVAS,**  
**CLERK**

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Petitioner,*

v.

RICHARD B. OGILVIE, as Trustee of the  
Chicago, Milwaukee, St. Paul & Pacific  
Railroad Company, BURLINGTON NORTHERN,  
INC., and the UNITED STATES OF AMERICA,  
*Respondents.*

**REPLY BRIEF OF PETITIONER ON  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT**

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Date: March 2, 1984

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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No. 83-972

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RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Petitioner,*

v.

RICHARD B. OGILVIE, as Trustee of the  
Chicago, Milwaukee, St. Paul & Pacific  
Railroad Company, BURLINGTON NORTHERN,  
INC., and the UNITED STATES OF AMERICA,  
*Respondents.*

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**REPLY BRIEF OF PETITIONER ON  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT**

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On December 12, 1983, the Railway Labor Executives' Association [hereinafter, "RLEA"] filed a petition with this Court requesting that this Court, pursuant to 28 U.S.C. § 1254(1), issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the decision and judgment entered by that appellate court in *In re Chicago, Milwaukee, St. Paul & Pacific Railroad*, 713 F.2d 274 (7th Cir. 1983). Respondents Richard B. Ogilvie, as trustee for the property of the Chicago, Milwaukee, St. Paul & Pacific Railroad [hereinafter, "MILW"], and the Burlington Northern, Inc. [hereinafter, "BN"] filed a brief in opposition to that petition. In their brief, the Trustee and the BN made several

argumentative factual statements that are inaccurate and to which petitioner believes a brief response should be made; consequently, petitioner RLEA respectfully submits this reply brief pursuant to Rule 22.5 of the Rules of this Court.

**I. Contrary To Respondents' Assertions, The Interstate Commerce Commission Did Not Find In This Case That The March 4 Hiring Agreement Adequately Protected All Railroad Employees Who Might Be Affected By The Sale Transactions**

In their brief, the Trustee and the BN refer to the Interstate Commerce Commission's [hereinafter, "ICC" or "Commission"] decision in this case and allege that: "The ICC referred to the March 4 Agreement and found that 'the interest of Railway Labor will be adequately protected with regard to the BN and UP purchases.' " Respondents Br. at 7, *quoting, Burlington Northern, Inc.—Purchase*, 363 I.C.C. 298, 312 (1980). By that statement, Respondents obviously seek to leave the impression that the ICC agrees with their position that the March 4 Hiring Agreement satisfies the commands of Section 5(b)(1) of the Milwaukee Railroad Restructuring Act [hereinafter, "MRRRA"], 45 U.S.C. § 904(b)(1), insofar as all potentially affected BN employees are concerned.<sup>1</sup> Such an impression, however, is inaccurate and misleading. A review of the ICC's decision in this case and its past decisions on this very issue show that the ICC recognizes that the March 4 Hiring Agreement does not by itself

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<sup>1</sup> Section 5(b)(1) of the MRRRA provides that: "In authorizing any . . . sale or transfer, the court shall provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49 of the United States Code."

satisfy the protective commands of Section 5(b)(1) of the MRRA.

In its decision which was issued on the BN's and Union Pacific Railroad's [hereinafter, "UP"] applications to purchase the MILW lines at issue, the ICC briefly addressed the employee protection question, and stated as follows:

BN and UP are signatories to the Labor Protective Agreement Between the Railroads Involved in the Midwest Restructuring and Employees of Such Railroads Represented by the Railway Labor Executives' Association [*i.e.*, the March 4 Hiring Agreement]. *This agreement was entered into on March 4, 1980, pursuant to MRRA, and benefits former Milwaukee employees who are hired by signatory railroads.* MRRA, section 8, provides that former Milwaukee employees have the first right of hire by rail carriers subject to our jurisdiction. *MRRA also states that the court shall provide for employee protection at least as favorable as that required under 49 U.S.C. 11347.* We find that the interest of railway labor will be adequately protected with regard to the BN and UP purchases.

*Burlington Northern, Inc.—Purchase, supra*, 363 I.C.C. at 312 (emphasis added). As may be seen from the above quote, the ICC referred to the Hiring Agreement and to the levels of protection required by Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347<sup>2</sup> in stating that the interests of rail labor will be adequately protected.

Even if there were any ambiguity in the Commission's statement, which of course there is not, that ambiguity

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<sup>2</sup> According to the ICC, Section 11347 requires in purchase cases at least the imposition of those employee protections set forth in *New York Dock Ry.—Control*, 360 I.C.C. 60, *aff'd*, *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). See, *The Continental Group, Inc.—Purchase*, 363 I.C.C. 822, 839-40 (1980).

would be dispelled by a decision of the ICC which was issued approximately two months before the Commission's decision in the *BN Purchase* case. In that earlier decision (*St. Louis Southwestern Ry.—Purchase*, 363 I.C.C. 323 (1980)), the Commission addressed the relationship between the March 4 Hiring Agreement and the requirements of 49 U.S.C. § 11347. In that case, the purchasing carrier asked the ICC to give all of its affected employees the March 4 Hiring Agreement levels of protection; RLEA opposed that request asserting that employees not expressly covered by that Agreement must be given the *New York Dock* levels of protection. As the ICC stated in rejecting the purchasing carrier's arguments:

It is obvious that labor negotiated the Hiring Agreement with various carriers in an attempt to provide as many of its members with jobs as possible. Few carriers seemed willing to purchase portions of RI [Rock Island] or Milwaukee in large part due to the expenses of labor protection. In order to give carriers an incentive to purchase RI and Milwaukee lines, and thus hire RI and Milwaukee employees, RLEA agreed to the Hiring Agreement level of protection for affected employees of the hiring carrier *in the same seniority districts*. It does not follow, as SP [*i.e.*, purchasing carrier] would have us believe, that all other affected SP employees should be limited to that protection.

SP employees affected by this transaction who are not expressly covered by the Hiring Agreement must get the level of employee protection required by *New York Dock*.

363 I.C.C. at 380 (emphasis in original).<sup>1</sup>

<sup>1</sup> Respondents also make several other factual statements with which RLEA takes issue, but, except as noted below, those statements need not be specifically addressed in this reply brief because, RLEA submits, its petition adequately sets forth the correct facts in

## CONCLUSION

For the reasons set forth in the Petition, RLEA respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the decision and judgment of that Court in the case at bar.

Respectfully submitted,

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Date: March 2, 1984

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this case. The one factual statement of Respondents which deserves separate comment is Respondents' allegation at page 5 of their brief that: "The March 4 Agreement established the total employee protection responsibility for any carrier purchasing property from the Milwaukee." That interpretation of the Hiring Agreement is the issue in dispute between RLEA and BN and is the issue which RLEA submits the lower courts did not have the subject matter jurisdiction to resolve. Moreover, such an expansive view of that Agreement is contrary to the express terms of that Agreement which provides in Article 1, Section 2(a) that: "The provisions of this agreement shall constitute the complete labor protection obligation of a purchasing carrier to the bankrupt carrier employees who are taken into its employ because of a transaction." Petition at 32a (emphasis added). Such a statement of intent is far different than the construction stated by Respondents in their brief.